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MARRIAGE
AND
DIVORCE LAWS
OF
MASSACHUSETTS.

BY
JOSEPH CUMMINGS,
OF THE SUFFOLK BAR.

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PREFACE.

The design of this work is to present in a concise form the law and rules of practice regulating the proceedings in causes of divorce. The leading cases in which questions of divorce law have been considered and determined have been carefully collected and cited. While it professes to be a handbook of Massachusetts law, frequent references are made to the decisions elsewhere, whenever they coincide with our own, or directly tend to explain and elucidate the text. The volume contains a treatise upon the substantive law of divorce and nullity of marriage, together with the defences commonly employed in such cases; the statutes relating to marriage and divorce, including the legislation of 1902; citations from the first 181 volumes of the Massachusetts Reports, and an appendix of forms.

J. C.

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CHAPTER I.

MARRIAGE.

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MARRIAGE DEFINED.

The term marriage has two meanings:—

1. It designates the relation of husband and wife; in which sense it is a status, and not a contract.
2. It designates the act by which the parties enter into the marital relation, as distinguished from the promise to marry. In this sense it has been called a contract, but strictly speaking it is the performance of the contract to marry resulting in a change of status.

Marriage is a relation founded upon mutual consent. That consent is a contract, but is one *sui generis*. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It can be neither canceled nor altered at the will of the parties. The public will and policy controls their will. The only element of a contract, in the ordinary acceptance of the term, that exists is that the consent of the parties is necessary to create the relation. When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest not upon their agreement, but upon the general law of the state, which defines and prescribes those rights, duties and obligations. It was of contract that the relation should be established, but, being established, the power of the parties as to their extent or duration is at an end. As between the immediate parties, marriage is a civil contract, but as between them and the state marriage is more than a civil contract; it is a status or relation controlled and regulated by considerations of public policy which are paramount to the rights of the parties.¹ The status of the parties is fixed in law when the marriage is entered into in the manner prescribed by the statutes,² and the validity of a marriage entered into in regular form is unaffected by a preliminary agreement of the parties not to live together, in consequence of which there is no consummation by cohabitation or coition.³

¹ *Watkins v. Watkins*, 135 Mass. 83, 84; *Ross v. Ross*, 129 Mass. 247, 248.

² *Eaton v. Eaton*, 122 Mass. 276; *Patrick v. Patrick*, 3 Phillim. 496; *Dalrymple v. Dalrymple*, 2 Hagg. Con. 54.

³ *Franklin v. Franklin*, 154 Mass. 515, 26 Am. St. Rep. 266.

3. Solemnization of marriage.

Requirements of Common Law.

At common law no formal ceremony is requisite to give validity to a marriage; but a contract between the parties *per verba de presenti* is enough; a doctrine said to have been derived originally from the canon law.⁴ A contract for cohabitation merely during the existence of mutual affection is not a contract of marriage within the meaning of this rule.⁵

Requirements of the Statutes. Must be celebrated by minister or magistrate.

The requisites of a valid marriage have been regulated from very early times by statutes of the Colony, Province and Commonwealth; the canon law was never adopted; and it was never received here as common law, that the parties could by their own contract, without the presence of an officiating clergyman or magistrate, take each other as husband and wife and so marry themselves.⁶ This clearly appears on tracing the history of the legislation upon the subject.⁷ No marriage is valid in Massachusetts unless celebrated by a magistrate or other authorized person.

Parsons, C. J., traced the marriage law of the state from the earliest colonial days, and showed that the statutes required the celebration by a justice or minister. He said: "When * * * the statute enacts that no person but a justice or a minister shall solemnize a marriage, and that only in certain cases, the parties are themselves prohibited from solemnizing their own marriages by any form of engagement, or in the presence of any witnesses whatever."⁸

It is a substantial compliance with the statute regulating marriages for the parties themselves to make mutual agreements in the presence of a justice of the peace, or a minister, with his consent, he undertaking to act on the occasion in his official capacity. But if the justice or minister does not consent to act in his official character,

⁴ *Morton v. Fenn*, 3 Doug. 211; 1 Black. Com. 439.

⁵ *Peck v. Peck*, 155 Mass. 479.

⁶ *Milford v. Worcester*, 7 Mass. 48, 53; 2 Dane Ab. 291, 301; 2 Winthrop's Hist. New England, 43; *Norcross v. Norcross*, 155 Mass. 425.

⁷ *Com. v. Munson*, 127 Mass. 459; R. L. ch. 151, sec. 30.

⁸ *Milford v. Worcester*, 7 Mass. 48.

the marriage is void; the woman cannot claim her dower, nor the issue seisin by descent.⁹

Justices of the Peace.

Justices of the peace formerly had full authority to solemnize marriages.¹⁰ This authority has been somewhat curtailed by recent legislation.¹¹ A justice of the peace now has no right to solemnize a marriage unless he is also a clerk or assistant clerk of a city or town, or a register or assistant register in the city or town in which he holds such office, or is a clerk or assistant clerk of a court in the city or town in which the court is authorized to be held, or unless he has been designated by the governor to solemnize marriages, and has qualified thereunder, in the city or town in which he resides.¹²

Clergymen, etc.

A minister of the gospel, ordained according to the usage of his denomination, who resides in this commonwealth, and continues to perform the functions of his office, may solemnize marriages.¹³ A person having been ordained as a minister of the gospel, according to the form observed in the Baptist churches, and being afterward engaged by two Baptist societies in the town where he lives to preach to them alternately, half the time to each, is an ordained minister of the gospel: and a marriage by him is valid. So of a Methodist minister, ordained and afterwards settled in any town, according to the usage of that denomination.¹⁴ A clergyman or rabbi, duly authorized to solemnize a marriage, may perform the marriage ceremony anywhere within the commonwealth, regardless of his residence or the residence of the contracting parties.¹⁵

Other Requisites.

The statutes not only restrict to certain persons the solemnization of marriages, but also direct that a license must be procured,¹⁶ that

⁹ Milford v. Worcester, 7 Mass. 54; Meyers v. Pope, 110 Mass. 316.

¹⁰ P. S. ch. 145, sec. 22.

¹¹ St. 1899, ch. 387.

¹² R. L. ch. 151, secs. 30 and 31.

¹³ R. L. ch. 151, sec. 30.

¹⁴ Com. v. Spooner, 1 Pick. 235.

¹⁵ St. 1894, ch. 409, sec. 5; R. L. ch. 151, sec. 30; 1 Op. Attys. Gen. of Mass. 445.

¹⁶ R. L. ch. 151, secs. 16 and 23.

the officer issuing the marriage license shall have power to administer oaths and to examine the applicant as to his age and other material facts,¹⁷ that a certificate of marriage shall be signed, returned and recorded,¹⁸ and that persons who violate these provisions shall be guilty of a criminal offense and liable to certain penalties.¹⁹ It is also provided that no person shall solemnize a marriage in this commonwealth unless he is able to read and write the English language.²⁰

Ceremony Presumed to be Regular.

A marriage solemnized in Ireland by a Roman Catholic priest and followed by cohabitation as husband and wife will, in the absence of proof of the law of Ireland, be presumed to be valid.²¹ A marriage solemnized in another state or country is presumed to be in conformity to the law of the place. The burden is upon the adverse party to prove its irregularity and invalidity.²²

Irregular Solemnization.

A marriage which is solemnized by a person who professes to be a justice of the peace, a minister of the gospel or a rabbi, or which is solemnized among Friends or Quakers according to their usages, shall not be void, nor shall the validity thereof be in any way affected by want of authority in such person or society, or by an omission or by informality in the manner of entering the intention of marriage, if the marriage is in other respects lawful and is consummated with a full belief of either of the persons so married that they have been lawfully married.²³

Slave Marriages.

The right to marry was secured to slaves in 1705 by Prov. St. 4 Anne, Anc. Chart. 748. The subsequent records of Boston and

¹⁷ R. L. ch. 151, secs. 17 and 19; Appendix, Form No. 78.

¹⁸ R. L. ch. 151, sec. 32.

¹⁹ R. L. ch. 151, sec. 32.

²⁰ R. L. ch. 151, sec. 30.

²¹ Com. v. Kenney, 120 Mass. 387.

²² Raynham v. Canton, 3 Pick. 293; Piers v. Piers, 2 H. L. Cas. 331.

²³ R. L. ch. 151, sec. 34; Meyers v. Pope, 110 Mass. 314; Com. v. Munson, 127 Mass. 465; Com. v. Caponi, 155 Mass. 534.

other towns show that their banns were published like those of white persons.²⁴ A runaway slave, so long as he was de facto free, though liable to recapture, had the civil rights of a free person in a free state to which he had escaped. A marriage in this commonwealth of a fugitive slave before the abolition of slavery was lawful while he remained here, whatever effect recapture might have had upon it, and such a marriage continuing after the abolition of slavery will not be disturbed.²⁵

Marriage Must be Proved.

A divorce from the bonds of matrimony will not be decreed unless a legal marriage be proved.²⁶

4. Evidence of marriage.

Record or An Attested Copy.

The recording of marriages was not required until the statute of 1786, and was intended to perpetuate the evidence of the fact after the witnesses had died.²⁷ The marriage may be proved by the record of the person who performed the ceremony.²⁸ A copy of the record of a marriage kept as provided by law and duly attested by the city or town clerk is prima facie evidence of the marriage.²⁹

Marriages Abroad.

Marriages in the presence of any consular officer of the United States in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia, are valid to all intents and purposes, and have the same effect as if solemnized within the United States. Such consular officers shall, in all cases, give to the parties married before them a certificate of such marriage, and shall send another certificate thereof to the Department of State,

²⁴ *Oliver v. Sale*, Quincy, 30, note.

²⁵ *Irving v. Ford*, 179 Mass. 216.

²⁶ *Mangue v. Mangue*, 1 Mass. 240; *Hill v. Hill*, 2 Mass. 150.

²⁷ *Com. v. Norcross*, 9 Mass. 492.

²⁸ R. L. ch. 151, sec. 37; *Milford v. Worcester*, 7 Mass. 54; *Ellis v. Ellis*, 11 Mass. 92; *Com. v. Littlejohn*, 15 Mass. 163; *Kennedy v. Doyle*, 10 Allen, 161, 164; 2 Dane Ab. 296.

²⁹ R. L. ch. 151, sec. 37; *Shutesbury v. Hadley*, 133 Mass. 246; *Com. v. Hayden*, 163 Mass. 453.

there to be kept; such certificate shall specify the names of the parties, their ages, place of birth, and residence.³⁰ A copy of the record of a marriage solemnized by a consul or diplomatic agent of the United States or a certificate from such consular agent is prima facie evidence of the marriage.³¹ The civil act of the city of Frankfort on the Main, requiring marriages to be solemnized in a particular form, does not apply to foreigners temporarily residing there; but a marriage in that city, before the United States consul, between a citizen of Massachusetts and a woman not domiciled there, is valid.³²

Admissions of Parties.

Marriage may be proved by evidence of an admission thereof by an adverse party without additional proof of the record or certificate of marriage.³³ An admission of the fact contained in a letter or a deed is sufficient, if identified as being in the handwriting of the person sought to be affected by it.³⁴

General Repute.

General reputation is admissible to prove the fact of marriage, which may be inferred from the parties being received into society as man and wife, and of their attending church and public places together as such, and otherwise demeaning themselves in public, and addressing each other as persons actually married.³⁵ Evidence of general repute, cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, need not necessarily come from the members or connections of the family of the parties whose marriage is in question, but it may come from any person who knows the circumstances.³⁶

³⁰ U. S. Sts. sec. 4082.

³¹ R. L. ch. 151, sec. 38.

³² *Loring v. Thorndike*, 5 Allen, 257.

³³ R. L. ch. 151, sec. 39.

³⁴ *Com. v. Holt*, 121 Mass. 61; *Com. v. Caponi*, 155 Mass. 534; *Com. v. Hayden*, 163 Mass. 453.

³⁵ R. L. ch. 151, sec. 39; *Com. v. Johnson*, 10 Allen, 196; *Com. v. Holt*, 121 Mass. 61; *Knower v. Wesson*, 13 Met. 143; *Bannister v. Henderson*, Quincy, 119.

³⁶ *Knower v. Wesson*, 13 Met. 143.

Cohabitation.

A marriage may be presumed from a long continued cohabitation of a man and a woman as husband and wife.³⁷

Witnesses Present at the Marriage.

A witness present at a marriage may testify to the fact of the marriage, and this is held to include the evidence of either of the contracting parties.³⁸ The testimony of a witness who performed the ceremony, that he was a clergyman and an ordained minister, is also competent evidence.³⁹ The testimony of witnesses is necessary to prove the identity of the parties, although the marriage is recorded.⁴⁰ The identity of a person is always a matter of inference and opinion, but it is an opinion which any one may give who remembers facts on which to base the inference.⁴¹ A picture or photograph is admissible in evidence, if verified by proof that it is a true representation of the subject. Whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and is not open to exception.⁴² But it has been held that, in matters generally within the discretion of a presiding judge, his discretion is not unlimited, that he is not at liberty to disregard the rules of law by which the rights of the parties are governed, and that the improper exclusion of a photograph will sustain an exception.⁴³

5. Validity Determined by the *Lex Loci Contractus*.

Marriages celebrated in other states or countries, if valid by the law of the place where they are solemnized, are valid within this

³⁷ *Newburyport v. Boothby*, 9 Mass. 414; *R. L. ch. 151*, sec. 39; *Means v. Wells*, 12 Met. 356; *Com. v. Hurley*, 14 Gray, 411; *Com. v. Holt*, 121 Mass. 61; *Knower v. Wesson*, 13 Met. 143; *Com. v. Belgard*, 5 Gray, 95.

³⁸ *Com. v. Norcross*, 9 Mass. 492; *Com. v. Littlejohn*, 15 Mass. 163; *Com. v. Dill*, 156 Mass. 226; *Com. v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468; *Raynham v. Canton*, 3 Pick. 293.

³⁹ *R. L. ch. 151*, sec. 39; *Com. v. Hayden*, 163 Mass. 453.

⁴⁰ *Com. v. Hayden*, 9 Mass. 492; *Com. v. Waterman*, 122 Mass. 59.

⁴¹ *Com. v. Pope*, 103 Mass. 440; *Com. v. Williams*, 105 Mass. 62, 67; *Com. v. O'Brien*, 134 Mass. 198, 200; *Com. v. Kennedy*, 170 Mass. 18.

⁴² *Blair v. Pelham*, 118 Mass. 420; *Com. v. Morgan*, 159 Mass. 375; *Reg. v. Tolson*, 4 F. & F. 103; *Dolan v. Mutual Reserve Fund Life Association*, 173 Mass. 197; *Carey v. Hubbardston*, 172 Mass. 106.

⁴³ *De Forge v. New York, etc., Railroad*, 178 Mass. 59.

commonwealth, although they might, by force of our laws, be held invalid, if contracted here. This principle has been adopted, as best calculated to protect the highest welfare of the community in the preservation of the purity and happiness of the most important domestic relation.⁴⁴ This doctrine is repugnant to the general principles of law relating to contracts; for a fraudulent evasion of the laws of the country where the parties have their domicile could not, except in the contract of marriage, be protected under the general principle. Thus parties intending to make an usurious bargain cannot give validity to a contract, in which more than the lawful interest of their country is secured, by passing into another territory, where there may be no restriction of interest, or where it is established at a higher rate, and there executing a contract before agreed upon.

The exception in favor of marriages so contracted must be founded on principles of policy, with a view to prevent the disastrous consequences to the issue of such marriages, as well as to avoid the public mischief which would result from the loose state in which people so situated would live. But it is not to be inferred from a toleration of marriages, which are prohibited merely on account of political expediency, that others, which would tend to outrage the principles and feelings of all civilized nations, would be countenanced.⁴⁵

Particular Cases.

A negro and a white person domiciled in Massachusetts were married in Rhode Island, where such a marriage was valid, although it was void under St. of 1786, c. 3, sec. 7, yet it was held to be valid in the former state because it was valid in the state where it was solemnized.⁴⁶ So also a marriage of a man with his mother's sister in England, and never attacked there, was held valid here, where the parties afterwards became domiciled, on collateral attack in an action

⁴⁴ *Greenwood v. Curtis*, 6 Mass. 378; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131; *West Cambridge v. Lexington*, 1 Pick. 506; *Sutton v. Warren*, 10 Met. 451; *Com. v. Hunt*, 4 Cush. 49; *Putnam v. Putnam*, 8 Pick. 433; *Loring v. Thorndike*, 5 Allen, 257; *Com. v. Graham*, 157 Mass. 73, 75; *Story's Conf. of Laws* (8th ed.), sec. 89 and 123b; *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509.

⁴⁵ *Medway v. Needham*, 16 Mass. 157, 159.

⁴⁶ *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131; *Medway v. Natick*, 7 Mass. 88.

at common law, although such marriage, if contracted in Massachusetts, would have been absolutely void.⁴⁷

Exceptions.

The only exceptions admitted by our law to the general rule that marriages valid where they are contracted are valid everywhere are of two classes: First, marriages which are deemed contrary to the law of nature as generally recognized in Christian countries as being polygamous or incestuous; second, marriages which the legislature of the commonwealth has declared shall not be allowed any validity, because they are contrary to the policy of our own laws.⁴⁸ The first class includes only those void for polygamy, or for incest. To bring it within the exception on account of polygamy, one of the parties must have another husband or wife living. To bring it within the exception on the ground of incest, there must be such a relation between the parties contracting as to make the marriage incestuous according to the general opinion of Christendom; and, by that test, the prohibited degrees include, beside persons in the direct line of consanguinity, brothers and sisters only, and no other collateral kindred.⁴⁹ If a foreign state allows marriages incestuous by the law of nature, as between brothers and sisters, such marriages would not be allowed to have any validity here. Marriages, however, not naturally unlawful, but prohibited by one state, and not by another, would be held valid in a state where they are not allowed. As in this state, a marriage between a man and his deceased wife's sister is lawful, but it is not so in some states; such a marriage celebrated here would be held valid in any other state, and the parties entitled to the benefits of a matrimonial contract.⁵⁰ There is also a provision in our statutes making marriages void in this state where persons resident in the state, whose marriage, if solemnized here, would be void, in order to evade our law, and with the intention of returning

⁴⁷ *Sutton v. Warren*, 10 Met. 451.

⁴⁸ *Com. v. Lane*, 113 Mass. 458.

⁴⁹ *Gray, C. J.*, in *Com. v. Lane*, 113 Mass. 458, 463; see also *Sutton v. Warren*, 10 Met. 451; *West Cambridge v. Lexington*, 1 Pick. 506; *Wightman v. Wightman*, 4 Johns. Ch. 343, 349, 351; 2 Kent Com. 83; *Story Conf. of Laws*, sec. 114.

⁵⁰ *Greenwood v. Curtis*, 6 Mass. 378, 379; *Sutton v. Warren*, 10 Met. 451, 452; *Com. v. Lane*, 113 Mass. 458; *Com. v. Graham*, 157 Mass. 73; *Chancellor Kent* in *Wightman v. Wightman*, 4 Johns. Ch. 343; 2 Kent Com. 85, note a.

to reside here, go into another state or country and there have their marriage solemnized.⁵¹

6. Proof of Foreign Law.

Statutes of other States.

Printed copies of the statute laws of any other state or territory or of the United States or of a foreign country, which purport to be published under the authority of their respective governments, or if commonly admitted and read as evidence in their courts, will be admitted in this commonwealth, in all courts of law and on all occasions, as *prima facie* evidence of such law.

Common Law of other States.

The common law of any other of the United States, or of the territories thereof, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts may also be admitted as evidence of such law.

The existence, tenor or effect of all foreign laws may be proved as facts by parol evidence; but if it appears that they are contained in a written statute or code, the court may in its discretion reject any evidence of such law which is not accompanied by a copy thereof.

The laws of other states must be proved as facts, and ordinarily, in a trial by jury, the question must be left to the jury to decide as a fact what the law of another state is,⁵² but when the evidence of a foreign law consists entirely of a judicial opinion or a statute, the question of its construction and effect is for the court.⁵³ In other words, if the evidence is a single statute or a decision of a court, the language of which is not in dispute, its interpretation is a question of law for the court; but if the law is to be determined by considering numerous decisions which may be more or less conflicting, or which

⁵¹ R. L. ch. 151, sec. 10.

⁵² *Walker v. Maxwell*, 1 Mass. 104; *Haven v. Foster*, 9 Pick. 130; *Holman v. King*, 7 Met. 384, 388; *Palfrey v. Portland, etc., Railroad*, 4 Allen, 56; *Hackett v. Potter*, 135 Mass. 349; *Shoe & Leather National Bank v. Wood*, 142 Mass. 563; *Ufford v. Spaulding*, 156 Mass. 65; *Cook v. Bartlett*, 179 Mass. 576.

⁵³ *Kline v. Baker*, 99 Mass. 253; *Ely v. James*, 123 Mass. 36; *Bride v. Clark*, 161 Mass. 130; *Cook v. Bartlett*, 179 Mass. 576; *Wylie v. Cotter*, 170 Mass. 356.

bear upon the subject only collaterally, or by way of analogy, and inferences must be drawn, it is a question of fact, and not of law.⁵⁴ A dictum of the highest court of another state is admissible as evidence of what the law of that state is.⁵⁵ The books of reports of cases adjudged in its courts are admissible to prove the unwritten or common law of another state.⁵⁶ A book purporting to contain the statutes of any one of the United States or of any foreign country, and to be printed by its authority, is *prima facie* evidence of the written law of such state.⁵⁷ A book offered at the trial as evidence of the law of another state, which does not purport to be published under the authority of the government of that state, nor appear to be commonly admitted and read as evidence in its courts, will be excluded.⁵⁸ A volume purporting to contain the laws of another state, with the words, "By authority," printed on the title page, sufficiently shows that it is printed by authority of the legislature of that state to warrant its admission in evidence.⁵⁹ The unwritten law of a foreign state, having first been ascertained to be part of the unwritten law by witnesses conversant with the laws of the state, may be proved by the parol evidence of witnesses of competent professional skill.⁶⁰ A statute of another state, or its repeal, could not, at common law, be proved by parol evidence,⁶¹ but under the statute the court may receive parol evidence of such written law, or may in its discretion reject any evidence of such law which is not accompanied by a copy thereof.⁶² The common law of another state is presumed to be the same as that which is established here, unless shown to be

⁵⁴ *Wylie v. Cotter*, 170 Mass. 356.

⁵⁵ *Hackett v. Potter*, 135 Mass. 349.

⁵⁶ *Penobscot & Kennebec Railroad Co. v. Bartlett*, 12 Gray, 244, 248; *Ames v. McCamber*, 124 Mass. 85.

⁵⁷ *Raynham v. Canton*, 3 Pick. 293 and note; R. L. ch. 175, sec. 75; *Ashley v. Root*, 4 Allen, 504.

⁵⁸ *Bride v. Clark*, 161 Mass. 130.

⁵⁹ *Merrifield v. Robbins*, 8 Gray, 150.

⁶⁰ R. L. ch. 175, sec. 76; *Frith v. Sprague*, 14 Mass. 455; *M'Rae v. Mattoon*, 13 Pick. 53; *Mowry v. Chase*, 100 Mass. 79; *Dalrymple v. Dalrymple*, 2 Hagg. Con. 81; 1 Greenl. Ev. sec. 488; *Story's Conf. of Laws*, 530; *Bowditch v. Soltky*, 99 Mass. 138.

⁶¹ *Raynham v. Canton*, 3 Pick. 293; *Frith v. Sprague*, 14 Mass. 455 and note; 1 Greenl. Ev. sec. 487.

⁶² R. L. ch. 175, sec. 77.

otherwise,⁶³ but there is no presumption that the statutory law of another state is the same as that of this commonwealth.⁶⁴ Where the law of another state is in controversy, the party upon whom the burden lies will fail unless evidence is produced to sustain his view, and statutes and decisions which were not put in evidence at the trial cannot be used for the first time at the argument of the case before the full court.⁶⁵ The court is necessarily confined to the statutes and decisions introduced in evidence at the trial, and in passing upon a bill of exceptions no statute of another state can be considered which is not made a part of it.⁶⁶

7. Mental Capacity of the Parties.

Insanity and Idiocy.

To constitute a valid marriage, the parties must be capable of intelligently consenting. Where by reason of mental defect, as in case of idiocy or insanity, a person has insufficient capacity to give an intelligent consent, he cannot enter into a valid marriage, because there can be no real consent. If the incapacity be such that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person or property, such person cannot dispose of his or her own person and property by the matrimonial contract, any more than by any other contract.⁶⁷

Sanity Presumed.

Sanity is presumed until the contrary appears. If a marriage is sought to be avoided on the ground of mental disability, proof of that fact lies with him who alleges it, to the extent, at least, of rebutting such presumption.⁶⁸

⁶³ *Thurston v. Percival*, 1 Pick. 415; *Chase v. Alliance Insurance Co.*, 9 Allen, 311; *Kelley v. Kelley*, 161 Mass. 111; *Abell v. Douglass*, 4 Denio, 305.

⁶⁴ *Murphy v. Collins*, 121 Mass. 6; *Daniels v. Pratt*, 143 Mass. 216; *Chipman v. Peabody*, 159 Mass. 420, 423; *Kelley v. Kelley*, 161 Mass. 111.

⁶⁵ *Murphy v. Collins*, 121 Mass. 6; *Kelley v. Kelley*, 161 Mass. 111.

⁶⁶ *Knapp v. Abell*, 10 Allen, 485, 488; *Upham v. Damon*, 12 Allen, 98, 99; *Kline v. Baker*, 99 Mass. 253; *Haines v. Hanrahan*, 105 Mass. 480, 482; *Hackett v. Potter*, 135 Mass. 349, 350.

⁶⁷ *Middleborough v. Rochester*, 12 Mass. 363; *Anon.*, 4 Pick. 32; *Browning v. Reane*, 2 Phillim. Ecc. 70; 2 Kent Com. 76; 1 Black. Com. 438; R. L. ch. 151, sec. 5.

⁶⁸ *Brooks v. Barrett*, 7 Pick. 94; *Jackson v. King*, 4 Cowen, 207.

Ability to Go Through with the Ceremony.

The fact of a party's being able to go through the marriage ceremony with propriety has been said to be prima facie evidence of sufficient understanding to make the contract.⁶⁹ It has been held also by other authorities that insane persons frequently do acts which appear perfectly rational, and may even conduct with propriety during a marriage ceremony.⁷⁰ In the words of Sir John Nicholl, "Foolish, crazy persons might be instructed to go through the formality of the ceremony, though wholly incapable of understanding the marriage contract."⁷¹ The insanity must exist at the time of the marriage to avoid it; neither prior nor subsequent insanity is sufficient for that purpose. If the marriage took place in a lucid interval it will be binding, but very strong evidence will be required to prove that the marriage was had during such lucid interval.⁷² Evidence of both prior and subsequent insanity at a period not too remote is relevant and admissible to determine the mental condition of the parties at the time of the marriage.⁷³ But though the marriage is absolutely void, and no sentence of avoidance is necessary, yet, as well for the sake of the good order of society as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction.⁷⁴

Collateral Attack Prohibited.

The validity of a marriage shall not be questioned in the trial of a collateral issue, on account of the insanity or idiocy of either party, but only in a process instituted in the lifetime of both parties to test such validity, and such a statute is constitutional. The marriage, therefore, of a lunatic or idiot is voidable and not absolutely void.⁷⁵

⁶⁹ Anon., 4 Pick. 32 (1826). See comments on this case in 2 Bishop on Mar., Div. and Sep., sec. 1240.

⁷⁰ Ray's Med. Jurisp. (2d ed.), sec. 200; Turner v. Meyers, 1 Hagg. Con. 422, 4 Eng. Ec. 440; Hunter v. Edney, 10 P. D. 95.

⁷¹ Browning v. Reane, 2 Phillim. Ecc. 69; 1 Eng. Ec. 190, 197.

⁷² Shelford on Mar. and Div. secs. 190, 197.

⁷³ Turner v. Meyers, 1 Hagg. Con. 414; Shelford on Mar. and Div. sec. 190.

⁷⁴ 2 Kent Com. 76; Browning v. Reane, 2 Phillim. Ecc. 69.

⁷⁵ St. 1845, ch. 222; R. L. ch. 151, sec. 5; Goshen v. Richmond, 4 Allen, 458.

Same — Nonage.

The age of consent in this commonwealth, as by the common law, is twelve in females and fourteen in males. Contracts of marriage between infants, being both of the age of consent, if executed, are as binding as if made by adults.⁷⁶ This rule, originally engrafted into the common from the civil law,⁷⁷ is undoubtedly an exception to the general principles regulating the contracts of infants; and might, at first, seem to disregard the protection and restraint with which the law seeks to surround and guard the inexperience and imprudence of infancy. But in regulating the intercourse of the sexes, by giving its highest sanctions to the contract of marriage, and rendering it, as far as possible, inviolable, the law looks beyond the welfare of the individual and a class to the general interests of society; and seeks, in the exercise of a wise and sound policy, to chasten and refine this intercourse, and to guard against the manifold evils which would result from illicit cohabitation. With this view, in order to prevent fraudulent marriages, seduction and illegitimacy, the common law has fixed that period in life when the sexual passions are usually first developed as the one when infants are deemed to be of the age of consent, and capable of entering into the contract of marriage.⁷⁸ A marriage that is voidable because of nonage differs from a marriage that is voidable because of a canonical disability, in that it can be avoided by the act of the party or parties, and no decree of nullity is necessary. But in order to have that effect the parties must have separated during such nonage and never cohabited thereafter.⁷⁹ The marriage of infants under the age of legal consent may be confirmed by acknowledgment or cohabitation, when both parties shall have reached the age of consent, and no new ceremony is necessary.

8. Consent of Parents.

A magistrate or minister shall not solemnize a marriage if he has reasonable cause to believe that the male is under the age of twenty-one years or the female is under the age of eighteen years, except with the consent of the parent or guardian having the custody of the

⁷⁶ 2 Kent Com. 78.

⁷⁷ 1 Bl. Com. 436.

⁷⁸ Parton v. Hervey, 1 Gray, 119.

⁷⁹ R. L. ch. 151, sec. 9.

minor, if there is any such parent or guardian in this commonwealth competent to act.⁸⁰ But the effect of these and similar statutes is not to render such marriages, when duly solemnized, void; although the statute provisions have not been complied with. They are intended as directory only upon ministers and magistrates, and to prevent, as far as possible, by penalties on them, the solemnization of marriages when the prescribed conditions and formalities have not been fulfilled. But in the absence of any provision declaring marriages, not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages, regularly made according to the common law, are valid and binding, although had in violation of this specific regulation imposed by statute.⁸¹ In the language of Parsons, C. J., "When a justice or minister shall solemnize a marriage between parties who may lawfully marry, although without the consent of the parents or guardians, such marriage would unquestionably be lawful, although the officer would incur the penalty for a breach of his duty."⁸² If a minor is legally married in another state, the marriage will be valid here although he left this commonwealth solely for the purpose of evading the statute requiring the consent of his father.⁸³

9. Marriage of Minors May be Authorized.

The judge of probate for the county in which a minor under the age specified in R. L., ch. 151, sec. 19, resides, may, after a hearing, make an order allowing the marriage of such minor, if the father of such minor, or, if he is not living, the mother, or, if neither parent is alive and resident in this commonwealth, a legal guardian duly appointed, has consented to such order. The judge of probate may also after a hearing make such order in the case of a person whose age is alleged to exceed that specified above, but who is unable to produce an official record of birth, whereby the reasonable doubt of the clerk or register may be removed.⁸⁴

⁸⁰ R. L. ch. 151, sec. 7.

⁸¹ 2 Kent Com. 90, 91; 2 Greenl. Ev. sec. 460; *Milford v. Worcester*, 7 Mass. 48; *Parton v. Hervey*, 1 Gray, 119, 122; *Com. v. Munson*, 127 Mass. 468, 469; *Com. v. Graham*, 157 Mass. 73; see *Hervey v. Moseley*, 7 Gray, 479.

⁸² *Milford v. Worcester*, 7 Mass. 54, 55.

⁸³ *Com. v. Graham*, 157 Mass. 73, 34 Am. St. Rep. 255.

⁸⁴ R. L. ch. 151, sec. 20.

Legitimacy of Issue of Void Marriages.

The issue of a marriage which is declared void by reason of the insanity, idiocy or nonage of either party are the legitimate issue of the parent who was capable of contracting the marriage.⁸⁵ If a marriage is declared void by reason of a prior marriage of either party, and the court finds that the second marriage was contracted with the full belief of the party who was capable of contracting the second marriage that the former husband or wife was dead, or that the former marriage was void, or that a divorce had been decreed which left the party to the former marriage free to marry again, such finding shall be stated in the decree, and the issue of the second marriage, if born or begotten before the second marriage was declared void, shall be the legitimate issue of the parent capable of contracting the marriage.⁸⁶ But the decree of nullity must be entered while both of the parties to the marriage are alive, and cannot be obtained by the survivor after the death of the other party.⁸⁷

10. Consanguinity and Affinity.

Affinity is the relationship by marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband. Consanguinity is blood relationship between persons descended from the same stock or common ancestor, in distinction from affinity or relation by marriage. The parties must not be related, either by consanguinity or affinity, within the prohibited degrees. The whole subject is now regulated by statutes defining the limits within which relatives may not marry, and declaring marriages within the prohibited degrees absolutely void.

Prohibited Degrees.

No man shall marry his mother, grandmother, daughter, granddaughter, sister, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister or mother's sister.⁸⁸ No woman shall marry her father, grandfather, son, grandson, brother, stepfather, grandmother's husband, daughter's

⁸⁵ R. L. ch. 151, sec. 13.

⁸⁶ St. 1902, ch. 310.

⁸⁷ Rawson v. Rawson, 156 Mass. 578.

⁸⁸ R. L. ch. 151, sec. 1.

husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother or mother's brother.⁸⁹ The prohibition continues notwithstanding the dissolution by death or divorce of the marriage by which the affinity was created, unless the divorce was granted because such marriage was originally unlawful or void.⁹⁰

Issue Illegitimate.

The issue of a marriage which is declared void by reason of consanguinity or affinity between the parties shall be illegitimate.⁹¹

Incest Indictable.

Persons within the degrees of consanguinity within which marriages are prohibited or declared by law to be incestuous and void, who intermarry or have sexual intercourse with each other, are liable to indictment for felony.⁹² But a marriage contracted out of the state and valid where contracted, if not incestuous by the law of nature, will not be within the purview of the statute.⁹³

11. Right to Marry Again

After a divorce from the bond of matrimony either party may marry again as if the other were dead, except that the party against whom the divorce was granted shall not marry within two years from the time of the entry of the final decree of divorce.

When persons resident in this commonwealth, in order to evade the law of this state, and with an intention of returning to reside in this commonwealth, go into another state or country and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this commonwealth.

According to the cases settled in England by the ecclesiastical court, and recognized by the courts of common law, the marriage is to be held valid or otherwise according to the laws of the place where it is contracted; although the parties went to the foreign state with an intention to evade the laws of their country. This doctrine is

⁸⁹ R. L. ch. 151, sec. 2.

⁹⁰ R. L. ch. 151, sec. 3.

⁹¹ R. L. ch. 151, sec. 12.

⁹² R. L. ch. 212, sec. 13.

⁹³ *Sutton v. Warren*, 10 Met. 451.

repugnant to the general principles of law relating to contracts. The exception in favor of marriages so contracted is founded on principles of policy, with a view to prevent the disastrous consequences to the issue of such marriages, as well as to avoid the public mischief which would result from the loose state in which people so situated would live. Motives of policy may likewise be admitted into the consideration of the extent to which this exception is to be allowed to operate. If without any restriction, then it might be that incestuous marriages might be contracted between citizens of a state where they were held unlawful and void; and the parties return and live in defiance of the religion and laws of their own country. But it is not to be inferred from a toleration of marriages which are prohibited merely on account of political expediency, that others, which would tend to outrage the principles and feelings of all civilized nations, would be countenanced.⁹⁴ The early statutes, in cases of divorce from the bond of matrimony, permitted the innocent party to marry again as if the other party were dead, but prohibited the guilty party from contracting any marriage during the life of the other party, unless the supreme judicial court, upon petition filed by the party against whom the divorce was granted, authorized such party to marry again.⁹⁵ Leave to marry again was granted by the supreme judicial court, in its discretion, upon proof that since the divorce the party from whom the divorce was granted had maintained a good character and was a fit person to marry.⁹⁶ If the guilty party, in violation of the prohibition contained in these statutes, married again in this state without leave of court, the marriage was void, although there was an honest belief that he had a right to marry.⁹⁷

Extra-Territorial Effect.

Statutes forbidding the guilty party to remarry after divorce have

⁹⁴ *Greenwood v. Curtis*, 6 Mass. 378; *West Cambridge v. Lexington*, 1 Pick. 506; *Putnam v. Putnam*, 8 Pick. 433; *Com. v. Hunt*, 4 Cush. 49; *Com. v. Lane*, 113 Mass. 458; *Milliken v. Pratt*, 125 Mass. 380, 381; *Com. v. Graham*, 157 Mass. 73; 2 Kent Com. (14th ed.) 91-93; *Medway v. Needham*, 16 Mass. 157; *Sutton v. Warren*, 10 Met. 451. See criticism of the last two cases in *Brook v. Brook*, 9 H. L. Cas. 193; S. C. 3 Sm. & Giff. 481.

⁹⁵ R. S. ch. 75, sec. 4; St. 1841, ch. 83; G. S. ch. 107, sec. 25 and 26; *Cochrane*, 10 Allen, 276; *Child's Case*, 109 Mass. 406; *Sparhawke v. Sparhawke*, 114 Mass. 355; *Thompson v. Thompson*, 114 Mass. 566.

⁹⁶ *Cochrane*, 10 Allen, 276; St. 1864, ch. 216.

⁹⁷ *Putnam v. Putnam*, 8 Pick. 433; *White v. White*, 105 Mass. 326.

no extra-territorial effect. Such prohibition is a penalty, and where an incapacity is penal it exists only within the state imposing it. The prohibition, therefore, was rendered practically valueless by the marriage of the guilty party in another state temporarily visited for the purpose of evading the laws of his domicile to which he immediately returned.⁹⁸ The restriction imposed by our statute applies only to divorces granted in this commonwealth.⁹⁹ A person against whom a divorce has been obtained for adultery in another state, by the law of which, in such a case, both parties may marry again, may contract a valid marriage in this state, without obtaining the leave of court provided for by the G. S., ch. 107, sec. 26, and St. 1864, ch. 216.¹⁰⁰ The law now is that after a divorce from the bond of matrimony either party may marry again as if the other were dead, except that the party against whom the divorce was granted shall not marry within two years from the time of the entry of the final decree of divorce.¹⁰¹ A marriage solemnized in this commonwealth between the guilty party to a divorce and another within two years from the entry of the final decree is void.¹⁰²

12. Foreign Marriages to Evade the Law. Void.

The doctrine that a marriage by the laws of the place where it is celebrated is valid in this state, on grounds of public policy, though the parties went into another state merely to evade our laws, being found inconvenient or repugnant to sound principle, the legislature, probably in consequence of the decision in *Putnam v. Putnam*, supra, enacted the first statute, which declared that marriages contracted within another state, which, if entered into here, would be void, shall have no force within this commonwealth.¹⁰³ It is competent for the

⁹⁸ *Medway v. Needham*, 16 Mass. 157; *Com. v. Putnam*, 1 Pick. 136; *Putnam v. Putnam*, 8 Pick. 433; *Clark v. Clark*, 8 Cush. 385; *Com. v. Lane*, 113 Mass. 458; *Bullock v. Bullock*, 122 Mass. 3; *Phillips v. Madrid*, 83 Me. 205; *Scott v. Atty. Gen.*, 11 Prob. Div. 128; *Warter v. Warter*, 15 Prob. Div. 152; *Hernandez's Succession*, 46 La. Ann. 962; 24 L. R. A. 831 and note.

⁹⁹ *Clark v. Clark*, 8 Cush. 385; *Com. v. Lane*, 113 Mass. 458.

¹⁰⁰ *Bullock v. Bullock*, 122 Mass. 3.

¹⁰¹ St. 1881, ch. 234, sec. 4; P. S. ch. 146, sec. 22; R. L. ch. 152, sec. 21.

¹⁰² *Googins v. Googins*, 152 Mass. 533; R. L. ch. 152, sec. 21; *Putnam v. Putnam*, 8 Pick. 433.

¹⁰³ R. S. ch. 75, sec. 6; see R. S. ch. 75, sec. 4, and R. S. ch. 130, sec. 2; *Whippen v. Whippen*, 171 Mass. 560, 561; R. L. ch. 151, sec. 10.

legislature to regulate by statute the marriage of persons domiciled within the commonwealth, although the general rule of law is that a marriage valid in the place where it is celebrated is valid everywhere.¹⁰⁴ If a man and a woman, before the expiration of two years after the entry of an absolute decree of divorce against her in this commonwealth, go into another state, and are married there according to its laws, in order to evade the laws of this state, and with the intention of returning to reside in this commonwealth, such marriage is void under the statutes.¹⁰⁵ But in order to make the marriage void in this commonwealth both persons must be residents of the commonwealth, and both must intend to evade the law by going into another state or country and having their marriage solemnized there, with the intention of returning to reside in the commonwealth, and both must afterwards return and reside in the commonwealth.¹⁰⁶ Therefore, if one of the parties was innocent of any intention to evade the statutes the marriage will be upheld.¹⁰⁷ If both parties had their marriage solemnized in another state for the purpose of evading the law of this state, this anomalous condition of affairs would exist, that such marriage, void here by operation of the statute, would be held valid by the United States courts and the courts of other states.¹⁰⁸

The Punishment.

If the guilty party in the divorce suit marries again in another state he is not liable to be punished for adultery,¹⁰⁹ or polygamy,¹¹⁰ or lewd and lascivious cohabitation.¹¹¹ He is not triable for a criminal offense committed in another state, but is punishable solely under the provisions of the particular statute.¹¹²

¹⁰⁴ Com. v. Graham, 157 Mass. 73.

¹⁰⁵ Tyler v. Tyler, 173 Mass. 150; R. L. ch. 151, sec. 10.

¹⁰⁶ Com. v. Lane, 113 Mass. 458; Whippen v. Whippen, 171 Mass. 560.

¹⁰⁷ Whippen v. Whippen, 171 Mass. 560.

¹⁰⁸ Com. v. Lane, 113 Mass. 458; Van Voorhes v. Brintnall, 41 Sickles (N. Y.) 18; Moore v. Hegeman, 47 Sickles (N. Y.) 521; Ponsford v. Johnson, 2 Blatchford, 51.

¹⁰⁹ Com. v. Putnam, 1 Pick. 26; State v. Weatherby, 43 Me. 258.

¹¹⁰ Com. v. Lane, 113 Mass. 458.

¹¹¹ Com. v. Hunt, 4 Cush. 49.

¹¹² Com. v. Putnam, 1 Pick. 136; Putnam v. Putnam, 8 Pick. 43; West Cambridge v. Lexington, 1 Pick. 506; Com. v. Richardson, 126 Mass. 34; Dickson v. Dickson, 1 Yerger, 110.

CHAPTER II.

DIVORCE IN GENERAL.

SECTION.

13. Jurisdiction to Grant Divorce.
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13. Jurisdiction to Grant Divorce.

Jurisdiction to entertain a suit for divorce is entirely statutory; but, when conferred, it is exercised as in the English ecclesiastical courts.

The only courts which had jurisdiction to entertain applications for divorce in England were the ecclesiastical courts, and they only granted divorces *a mensa et thoro*. Courts of common law and courts of chancery had no jurisdiction. In this country there is no tribunal which has the jurisdiction of ecclesiastical courts. Our courts have jurisdiction to decree divorces only when authority has been expressly conferred by statute. The statutes are clearly original regulations, intended to authorize divorces in cases in which no divorce could before be obtained. To consider these statutes as an adoption of the English law of divorce would be a violent perversion of the language and intention of the legislature. Such a construction of these laws would in effect declare that statutes authorizing divorces in certain cases particularly specified also authorized divorces in a multitude of other cases not specified.¹ When such jurisdiction has been conferred, it is exercised in accordance with the law as administered in the ecclesiastical courts, except in so far as that law has been modified by statute.² In *Robbins v. Robbins*, *supra*, the court said:

¹ *Robbins v. Robbins*, 140 Mass. 528; *Kelley v. Kelley*, 161 Mass. 111; *Burtis v. Burtis*, Hopk. Ch. 557.

² *Robbins v. Robbins*, 140 Mass. 528; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Devanbagh v. Devanbagh*, 5 Paige, 554; *Le Barron v. Le Barron*, 35 Vt. 365.

"Although the procedure may be 'according to the course of proceeding in ecclesiastical courts,' yet it is not clear that the decisions of those courts upon questions of substantive law are of the same weight here as are the decisions of the English courts of law and chancery. One reason is that the ecclesiastical courts proceed according to the canon law, as allowed and adopted in England, but the canon law was never adopted by the colonists of Massachusetts; it was not suited to their opinions or condition. Marriage and divorce here have always been regulated wholly by statute."

The superior court may, in all cases where the course of proceeding is not specially prescribed, hear and determine, according to the course of proceeding in ecclesiastical courts and in courts of equity; all matters coming within the purview of the statutes regulating divorces, and may issue process of attachment and of execution and all other proper and necessary processes.³

14. Superior Court Has Exclusive Jurisdiction.

The superior court has exclusive original jurisdiction of all causes of divorce and nullity or validity of marriage, and in such proceedings has all powers as to alimony, the custody of children or otherwise which the supreme judicial court has heretofore had and exercised.

A full history of our early law of divorce is nowhere to be found; nor are the materials for such a history readily accessible. Since the time of the province charter, however, this much is plain, that by St. 4 W. & M.⁴ it was enacted that all controversies concerning marriage and divorce should be heard and determined by the governor and council; that by the state constitution it was declared that this jurisdiction of the governor and council, in cases of marriage, divorce and alimony, should continue until the legislature should by law make other provision;⁵ that no other provision was made until the legislature directed that all questions of divorce and alimony should be heard by the supreme judicial court.⁶ This continued to be the law until exclusive original jurisdiction in all matrimonial causes was

³ R. L. ch. 152, sec. 29; *Burrows v. Purple*, 107 Mass. 428; *Carter v. Carter*, 109 Mass. 306.

⁴ Anc. Chart, 243.

⁵ C. 3, art. 5.

⁶ St. 1785, ch. 69, sec. 7.

transferred to the superior court.⁷ The statute of 1887, ch. 332, which conferred upon the superior court exclusive jurisdiction of all causes of divorce, did not apply to cases pending in the supreme judicial court at the time it went into effect. A libel for divorce originally brought in the supreme judicial court, in which a decree nisi had been entered when the statute was passed, would be pending in that court within the meaning of the statute, although it had been dismissed from the docket by direction of the presiding justice, the object of the order being not to dismiss the case absolutely, but to relieve the docket and dispense with the necessity of calling it whenever the docket was called, leaving the parties, if for any reason further action was required, to move that the entry be stricken off and the case brought forward, and such a motion was made and allowed upon a petition to have the decree made absolute.⁸ The federal courts have no jurisdiction of divorce or the allowance of alimony without divorce, either as an original proceeding in equity or as a controversy between citizens of different states.⁹ A proceeding in the nature of a bill of review to vacate a decree of divorce on the ground of fraud cannot be removed to a federal court on the ground of citizenship, although a sufficient sum of alimony is in controversy. The state and federal statutes relating to removal of causes have no application to such a case.¹⁰ If a divorce suit has been removed to a federal court such court will on its own motion remand the case to the state court.¹¹

15. Divorce or Judicial Separation.

Divorce is the legal separation of husband and wife by the judgment of a court. There are two kinds:—

A divorce a vinculo matrimonii which dissolves the marriage.

A divorce a mensa et thoro which only suspends the effect of the marriage so far as cohabitation is concerned.

⁷ St. 1887, ch. 332; R. L. ch. 157, sec. 3; R. L. ch. 152, sec. 6; Sparhawk v. Sparhawk, 116 Mass. 315; Shannon v. Shannon, 2 Gray, 286.

⁸ Darrow v. Darrow, 159 Mass. 262.

⁹ Barber v. Barber, 21 How. 582; Johnson v. Johnson, 13 Fed. Rep. 193; Sharon v. Hill, 26 Fed. Rep. 337.

¹⁰ Caswell v. Caswell, 120 Ill. 377.

¹¹ Johnson v. Johnson, 13 Fed. Rep. 193.

The term divorce in England is now applied both to decrees of nullity of marriage and decrees of dissolution, but in this country the term is limited to decrees dissolving or suspending the effect of a valid marriage. Divorce means the legal separation of man and wife, effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation or suspending its effects so far as concerns the cohabitation of the parties.¹²

Divorce a Vinculo.

When there is a total dissolution of the marriage it is called a divorce from the bond of matrimony, or a vinculo matrimonii. The parties are wholly released from their matrimonial obligations. A divorce a vinculo destroys the common-law fiction of unity of husband and wife, and enables the wife to maintain an action against her former husband to recover the proceeds of promissory notes given to her before the marriage and received by him after the divorce.¹³ The husband also may sue his former wife.¹⁴ At common law the wife has no cause of action for damages for assault and battery committed by the husband during marriage, and a subsequent divorce does not give her any greater rights. No right existed during the marriage, and none was created by the divorce.¹⁵

Divorce a Mensa et Thoro.

When the divorce merely suspends the effect of the marriage as to cohabitation, it is called a divorce from bed and board, or a mensa et thoro. This species of divorce is partial or qualified. The parties are separated and forbidden to live or cohabit together, but the marriage itself still exists. It is only a judicial separation of the parties, terminable whenever both agree to live together again. They still continue husband and wife, and their legal unity is not wholly destroyed. This species of divorce was unknown to the ancient church, and was first established by the decrees of the Council of Trent.¹⁶ A divorce from bed and board was formerly decreed for

¹² Black, Law Dict. tit. "Divorcee."

¹³ Legg v. Legg, 8 Mass. 99; Webster v. Webster, 58 Me. 139; Pierce v. Burnham, 4 Met. 303; Chapin v. Chapin, 135 Mass. 393.

¹⁴ Blake v. Blake, 64 Me. 177; Lane v. Lane, 80 Me. 570.

¹⁵ Phillips v. Barnet, 1 Q. B. Div. 436; Abbott v. Abbott, 67 Me. 304.

¹⁶ Kriger v. Day, 2 Pick. 316; Dean v. Richmond, 5 Pick. 461-467; Ames v. Chew, 5 Met. 320; Allen v. Allen, 100 Mass. 375; Garnett v. Garnett, 114 Mass.

extreme cruelty, utter desertion, gross and confirmed habits of intoxication contracted after marriage, or cruel and abusive treatment by either of the parties; and on the libel of the wife, when the husband, being of sufficient ability, grossly or wantonly and cruelly refused or neglected to provide suitable maintenance for her.¹⁷ Divorces from bed and board were, however, abolished by the St. of 1870, ch. 404.

But if a divorce from bed and board had been granted under laws in force at the time of the passage of that act, or a decree nisi had been decreed and the parties had lived separately for three consecutive years next after the decree, a divorce from the bonds of matrimony might be decreed upon the petition of the party in whose favor the previous divorce was granted; and when the parties had lived separately for five consecutive years next after the decree, a divorce from the bond of matrimony might be decreed in favor of either party.¹⁸ No new service was necessary to found jurisdiction for such supplementary proceedings.¹⁹ The statutes now provide that all decrees of divorce shall in the first instance be decrees nisi, to become absolute after the expiration of six months from the entry thereof, unless the court has for sufficient cause, on application of any party interested, otherwise ordered.²⁰

16. Decree Nisi Does Not Dissolve the Marriage.

A decree of divorce nisi does not dissolve the marriage, or change the status of the parties. A total dissolution of the marriage does not take place until the decree is made absolute.

The decree nisi which precedes the closing or final sentence originated in England, and was embodied in the provisions of the statutes which enlarged the divorce jurisdiction and transferred it from the ecclesiastical to the temporal courts.²¹ The decree nisi is a prelim-

347; *Edgerly v. Edgerly*, 112 Mass. 53; *Graves v. Graves*, 108 Mass. 320; *Hulse v. Hulse*, Law Rep. 2 P. & D. 259; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Barber v. Barber*, 21 How. 601.

¹⁷ R. S. ch. 76, sec. 6; Gen. St. ch. 107, sec. 9.

¹⁸ *Bigelow v. Bigelow*, 108 Mass. 38; P. S. ch. 146, sec. 3; *Whiting v. Whiting*, 114 Mass. 494; *Fera v. Fera*, 98 Mass. 157.

¹⁹ *Peaslee v. Peaslee*, 147 Mass. 171.

²⁰ St. 1893, ch. 280; R. L. ch. 152, sec. 18. Certificate of Decree Absolute — Appendix Forms Nos. 71, 72, 73, and note.

²¹ 23 and 24 Viet. ch. 144, sec. 7; 29 Viet. ch. 32, sec. 3; 36 Viet. ch. 31.

inary decree rendered in a suit for absolute divorce after a full hearing and finding on the merits. It is in the nature of a decree of separation for a fixed time, being substantially equivalent to a divorce from bed and board, and does not dissolve the marriage. The marital relation is not terminated until the entry of the decree absolute.²² If a decree of divorce nisi has been entered, and the death of either party occurs before the decree has been made absolute, and before the time when it could have been made absolute, an end is thereby put to the suit, and the decree cannot thereafter be made absolute, either by order of court or by the operation of the St. 1893, ch. 280, sec. 1. The property rights of the parties are not changed, and the wife whose husband dies before the decree nisi is made absolute is entitled to an allowance from the decedent's personal estate, and to the other property rights of a widow. The survivor is entitled to administer, the wife to dower, and the husband to curtesy.²³ A decree of divorce nisi does not prevent the libellant from maintaining another libel for adultery committed after the decree. As the bond of matrimony is not absolutely dissolved, the commission of adultery by either party is equally a breach of the marital obligation, whether they are living together or separately; and the fact that the innocent party has already, for a less heinous violation of marital duty, obtained a qualified and incomplete divorce, which, if the parties continue to live apart for a certain time, may be made absolute, affords no reason why that party should be debarred from immediately seeking an absolute and complete divorce for an offense which there is nothing to excuse or palliate, and which is declared by statute to be of itself a cause for the final dissolution of the matrimonial relation.²⁴ The decree absolute, granted after the decree nisi, takes effect at the time it is rendered, and does not

²² *Bigelow v. Bigelow*, 108 Mass. 38; *Graves v. Graves*, 108 Mass. 314; *Edgerly v. Edgerly*, 112 Mass. 53; *Fox v. Davis*, 113 Mass. 255, 258; *Garnett v. Garnett*, 114 Mass. 347; *Whiting v. Whiting*, 114 Mass. 494; *Wales v. Wales*, 119 Mass. 89; *Moors v. Moors*, 121 Mass. 232; *Cook v. Cook*, 144 Mass. 163; *Brigham v. Brigham*, 147 Mass. 159; *Peaslee v. Peaslee*, 147 Mass. 171; *Googins v. Googins*, 152 Mass. 533; *Pratt v. Pratt*, 157 Mass. 503; *Chase v. Webster*, 168 Mass. 228; *Noble v. Noble*, L. R. 1 P. & D. 691; *Collins v. Collins*, 9 Prob. Div. 231; *Dering v. Dering*, L. R. 1 P. & D. 531; *Wickham v. Wickham*, 6 Prob. Div. 231.

²³ *Chase v. Webster*, 168 Mass. 228.

²⁴ *Edgerly v. Edgerly*, 112 Mass. 53; *Geils v. Geils*, 1 Macq. 255; *Ritchie v. Ritchie*, 4 Macq. 162; *Hulse v. Hulse*, L. R. 2 P. & D. 259.

relate back to the date of the decree nisi.²⁵ And it is doubted whether the court has power to enter a decree *nunc pro tunc* in such cases.²⁶ Before the statute of 1873, ch. 371, a decree nisi could be made absolute on the application of either party.²⁷ But by the terms of that act a divorce could only be granted on the application of the party in whose favor a decree nisi or a decree of separation had been entered.²⁸ The statute of 1881, ch. 234, sec. 2, provided that decrees nisi should become absolute on the application of either party to the clerk, and on such application the clerk should enter a final decree unless the court had for sufficient cause, on application of any party interested, otherwise ordered.²⁹ The statute now embodying the law on the subject provides that decrees nisi shall become absolute, as a matter of course, and by operation of law, after the expiration of six months from the entry thereof, unless the court has for sufficient cause, on application of any party interested, otherwise ordered.³⁰

17. Marriage of Libellant Before Decree Nisi is Made Absolute — Mistake of Fact.

A libellant who has obtained a decree nisi, and who, after waiting the time required by law, believing and having reasonable ground to believe that he has obtained a decree absolute, and being guilty of no negligence, marries again and cohabits with the person he has married, is entitled, nevertheless, to have the decree nisi made absolute. It must be shown that the libellant acted under a mistake of fact; that negligence was not imputable to him, and that he was not guilty of any moral fault.³¹ A woman who had obtained a decree nisi in divorce proceedings in this commonwealth wrote to her attorney to have the papers of her divorce sent to her at once. She received a reply from him stating that the six months would not expire until the next month; that he would then attend to having the decree made

²⁵ *Cook v. Cook*, 144 Mass. 163; *Norman v. Villars*, 2 Exch. Div. 359.

²⁶ *Cook v. Cook*, 144 Mass. 163.

²⁷ *Bigelow v. Bigelow*, 108 Mass. 38.

²⁸ *Sparhawk v. Sparhawk*, 114 Mass. 355; *Darrow v. Darrow*, 159 Mass. 262; 21 L. R. A. 100.

²⁹ P. S. ch. 146, sec. 19; Appendix Form No. 73 and note.

³⁰ St. 1893, ch. 280; Divorce Rule V; R. L. ch. 152, sec. 18; Appendix Form No. 71.

³¹ *Pratt v. Pratt*, 157 Mass. 503; *Darrow v. Darrow*, 159 Mass. 262, 265.

absolute, and that it would not be necessary for her to appear personally. The attorney was prevented from attending to the matter by reason of illness. The libellant, supposing that her attorney had attended to the matter, and that her divorce had been made absolute, after the six months had expired, without doing anything more as to her divorce, married again in another state, in good faith, believing that she had a legal right so to do, and lived with the man whom she had married until she learned that the divorce had not been made absolute, and that the marriage was not valid. It was held that these facts would warrant a finding that the libellant was not guilty of negligence; and that she honestly believed and had reason to believe in the existence of a fact which, if true, would have made her remarriage lawful.³²

The Same — Mistake of Law.

If, however, the libellant supposed that the decree nisi was an absolute divorce, and married again within the six months, it would be a mistake of law, and he would not be entitled to relief. Such conduct operates as a revocation of the original decree, which is conditional in its nature, makes the second marriage illegal and void, and leaves the first marriage in full force.³³

Difference Between a Mistake of Fact and a Mistake of Law.

A mistake of fact, without negligence or moral fault, may be relieved against, but if it is a mistake of law no relief will be granted, as everybody is presumed to know the law, and ignorance of the law excuses no man.³⁴

18. Divorce Granted Notwithstanding the Presumption of Death Arising From Long Absence.

A divorce from the bond of matrimony may be decreed for any of the causes allowed by law notwithstanding the fact that the libellee has been continuously absent for such a period of time and under such circumstances as would raise the presumption of death.

³² Pratt v. Pratt, 157 Mass. 503.

³³ Moors v. Moors, 121 Mass. 232; Peirce v. Peirce, 160 Mass. 216.

³⁴ Moors v. Moors, 121 Mass. 232; Pratt v. Pratt, 157 Mass. 503; Darrow v. Darrow, 159 Mass. 262, 265; Peirce v. Peirce, 160 Mass. 216.

It is a well established principle of the common law, that the presumption of death arises after a person has been absent for seven years from his usual place of abode, without being heard of or known to be living.³⁵ The presumption of life then ceases, and that of death arises. But this presumption may be rebutted by counter evidence, or by a conflicting presumption. The period of seven years has been adopted in analogy to the English statutes concerning bigamy and leases for lives.³⁶ The statute of bigamy has been adopted in this commonwealth.³⁷ It has been held, under this statute, that if the husband absents himself from his wife, and remains absent for the space of seven years, a man who should, under such circumstances, and not knowing her husband to be living within that time, in good faith and in the belief that she has no husband, intermarry with her and cohabit with her as his wife, would not by such acts be criminally punishable for adultery, although it should subsequently appear that the former husband was then living.³⁸ But if the wife leaves her husband and remains absent from him for more than seven years without hearing from him, a man may be convicted of adultery who in good faith, and in the belief that she is a widow, marries and cohabits with her, if in fact her husband is still living. The distinction seems to be that the presumption of death is applicable only to the person who leaves his home or place of residence and is gone more than seven years and not heard of, and does not apply in any event to the party who is deserted.³⁹ So, also, if a woman, who has a husband living, marry another person, she is punishable, though her husband has voluntarily withdrawn from her, and remained absent and unheard of for any period of time less than seven years, and though she honestly believes, at the time of her second

³⁵ *Loring v. Steineman*, 1 Met. 204; *Commonwealth v. Thompson*, 6 Allen, 591; 1 Greenl. Ev. sec. 41 and cited cases; 2 Kent's Com. (14th ed.) 436, note; In re Rhodes, 36 Ch. D. 586.

³⁶ Sts. 1 Jac. I, c. 11; 19 Car. II, c. 6; *King v. Paddock*, 18 Johns. 141; *Osborn v. Allen*, 26 N. J. L. 388; *Forsaith v. Clark*, 1 Fost. 409; *George v. Jesson*, 6 East 80; *Wentworth v. Wentworth*, 71 Me. 72; *Winship v. Conner*, 42 N. H. 341; *Marden v. Boston*, 155 Mass. 359; *Reedy v. Millizen*, 155 Ill. 636.

³⁷ R. L. ch. 212, sec. 11.

³⁸ *Commonwealth v. Thompson*, 6 Allen, 592.

³⁹ *Commonwealth v. Thompson*, 11 Allen, 23; see 1 Bish. Cr. L. sec. 3030, note, par. 18; Bish. on Stat. Cr. sec. 663.

marriage, that he is dead.⁴⁰ Lord Blackburn has said that it is necessary, in order to raise the presumption of death, that there should have been an inquiry and search made for the man among those who, if alive, would be likely to hear of him. The mere fact that no witness called had heard of him is not sufficient.⁴¹ There is no rule of law which confines such intelligence to any particular class of persons, and it has been held that people in the neighborhood not relatives may testify that the absent person has not been heard of by them.⁴² Accordingly, absence of more than forty years does not raise the presumption of death, in the absence of evidence to show that any means were used to ascertain whether he was dead or alive.⁴³ If a husband, who has been deserted by his wife for seven years, and who has no actual knowledge that she is alive, goes through a form of marriage and cohabits with another woman, he is guilty of adultery, and is precluded from obtaining a divorce for such desertion, there being no presumption of the wife's death, and it not appearing that he had no belief or reason to believe that she was alive or information which would lead upon inquiry to actual knowledge.⁴⁴ The reasonableness of the inquiry is a mixed question of law and fact to be determined upon the particular circumstances of each case. What would be reasonable in one case might not be in another.⁴⁵ The mere absence of a person from the commonwealth without being heard from for any period short of seven years is not sufficient to raise a legal presumption of his death.⁴⁶

The following cases illustrate the application of this doctrine to a certain state of facts:

The fact that neither a vessel in which a person went to sea forty

⁴⁰ *Commonwealth v. Mash*, 7 Met. 472.

⁴¹ *Prudential Assur. Co. v. Edmonds*, 2 App. Cas. 487-509; see also *Flynn v. Coffee*, 12 Allen, 133; *Commonwealth v. Thompson*, 11 Allen, 23; *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87-96; *In re Phené's Trusts*, L. R. 5 Ch. 139; *In re Lewé's Trusts*, L. R. 6 Ch. 356; 1 Taylor Ev. sec. 200; 1 Greenl. Ev. sec. 41; *Stockbridge, Petitioner*, 145 Mass. 517; *Nepean v. Doe*, 2 M. & W. 894.

⁴² *Doe v. Deakin*, 4 B. & Ald. 433; *Wentworth v. Wentworth*, 71 Me. 72, 74.

⁴³ *Crouch v. Eveleth*, 15 Mass. 305.

⁴⁴ *Whippen v. Whippen*, 147 Mass. 294.

⁴⁵ *Doe v. Andrews*, 15 Q. B. 756; *Clarke v. Cummings*, 5 Barb. 339.

⁴⁶ *Newman v. Jenkins*, 10 Pick. 515; see *M'Comb v. Wright*, 5 Johns. Ch. 263; *Doe v. Nepean*, 5 Barn. & Adol. 86; *Battin v. Bigelow*, Peter's Circ. C. R. 452; *Commonwealth v. Mash*, 7 Met. 472.

years ago, nor the person, has been heard from since, will warrant the inference that such person is dead.⁴⁷

Where a demandant claimed a title under one of six children of the former owner of the land, evidence that inquiries had been made in regard to the other five children, and that nothing had been heard of them for seventy years, was held sufficient to justify a jury in finding that they had died without issue.⁴⁸

Where a married man sailed in a vessel from New York on a voyage to South America, and neither he nor the vessel had ever been heard of since, this was held to be sufficient evidence of his death, on a plea of coverture, in an action brought against his wife, as a feme sole, twelve years after the departure of her husband.⁴⁹

Evidence that a pensioner of the United States left in 1867 the place where his wife and children and his other relatives lived, and that they, as well as the authorities of the Pension Department, although making efforts to learn his whereabouts, never heard from him afterwards, is sufficient to warrant a finding that he died before January 1, 1881.⁵⁰

A woman married a second husband after living separate from the first husband for about four years, without hearing of him or of his death, and did not hear of him for sixteen years afterwards. Held, that the presumption was that she was the lawful wife of the second husband.⁵¹

A man left his wife and family in August, 1871, to seek work. His wife heard from him only twice after he left, the last time being about three weeks after so leaving, and she never heard of him again, though she made inquiries. These facts were held sufficient to raise a presumption that he died before June 21, 1881.⁵²

If at the trial of a libel for divorce for desertion the evidence produced to prove the desertion raises the presumption of death, the libel will be dismissed, although as a matter of fact the libellee might be living.⁵³ If, however, the libellant found himself confronted at the

⁴⁷ Bowditch v. Jordan, 131 Mass. 321.

⁴⁸ King v. Fowler, 11 Pick. 302.

⁴⁹ King v. Paddock, 18 Johns. 141.

⁵⁰ Marden v. Boston, 155 Mass. 359.

⁵¹ Kelly v. Drew, 12 Allen, 107.

⁵² Stockbridge, Petitioner, 145 Mass. 517.

⁵³ Bodwell v. Bodwell, 113 Mass. 314.

trial with this presumption of death, the only way at common law that he could prevent his libel from being dismissed was to offer evidence to rebut the presumption, and to prove that the libellee was really alive, or raise a presumption of life, the burden of proof being upon the libellant.⁵⁴ The presumption of death is a presumption of fact, and may be rebutted by very slight evidence; a single letter from the person within the seven years destroys it; or testimony of a witness that he has heard the person is living. Hearsay evidence is usually incompetent, but in this case it is admitted, and constitutes an exception to the general rule.⁵⁵ There is no rule as to the particular time within the period at which death is presumed to have occurred. The meaning of this is that one who asserts a right based upon the death of a person at any particular time during the seven years, must prove by a preponderance of evidence that death took place at such time. The law does not presume anything as to the particular time of death. The doctrine of the court of king's bench is that the presumption of law relates only to the fact of death, and that the time of death is a subject of distinct proof.⁵⁶ The rule of the common law, which, as has been stated, requires the libel to be dismissed if the evidence offered to prove the desertion raises the presumption of death, has been modified by statute to the extent that the court may retain the libel and grant the divorce notwithstanding the fact that the libellee has been continuously absent for such a period of time and under such circumstances as would raise the presumption of death.⁵⁷

19. Resumption of Former Name by Wife.

A woman at marriage loses her surname and acquires that of her husband, and a divorce a vinculo does not restore her former name unless the decree so provides.⁵⁸ The court is authorized by statute, upon granting a divorce to a woman, to allow her to resume her

⁵⁴ 2 Greenl. Ev. sec. 278f and cases.

⁵⁵ *Flynn v. Coffee*, 12 Allen, 133; *Brown v. Jewett*, 18 N. H. 230.

⁵⁶ *Nepean v. Doe*, 2 Mees & W. 894; *Davie v. Briggs*, 97 U. S. 628; *Hickman v. Upsall*, 4 Ch. D. 144; *McCartee v. Camel*, 1 Barb. Ch. 455; see also *Montgomery v. Bevans*, 1 Sawy. 653; Fed. Cas. No. 9,735.

⁵⁷ St. 1884, ch. 219; R. L. ch. 152, sec. 3.

⁵⁸ *Fendall v. Goldsmith*, 2 Prob. Div. 263.

maiden name or the name of a former husband. A prayer to that effect should be inserted in the libel.⁵⁹ At common law, a person may legally name himself, or change his name, or acquire a name by reputation or general usage, and in the absence of fraud do business and execute contracts in any name he chooses to assume.⁶⁰

⁵⁹ R. L. ch. 152, sec. 20; Appendix Form No. 12.

⁶⁰ 21 A. & E. Enycl. of L. (2d ed.) 311.

CHAPTER III.

SECTION.

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20. Grounds of Divorce.

There are by the statutes of this commonwealth the following distinct causes of divorce from the bonds of matrimony:

- (a) Adultery.
- (b) Impotency.
- (c) Utter desertion continued for three consecutive years next prior to the filing of the libel.
- (d) Gross and confirmed habits of intoxication caused by the voluntary and excessive use of intoxicating liquor, opium or other drugs.
- (e) Cruel and abusive treatment.
- (f) On the libel of the wife, if the husband, being of sufficient ability, grossly or wantonly and cruelly

refuses or neglects to provide suitable maintenance for her.

- (g) If either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison or in a jail or house of correction; and after a divorce for such cause no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights.⁰

21. Grounds of Divorce — Adultery.

Adultery, as a ground for divorce, is the voluntary sexual intercourse of a married person with a person other than the husband or wife.

It was only the ecclesiastical courts in England prior to 1858 which had jurisdiction to grant divorces. The courts granted divorces for adultery, but the divorce was only a *mensa et thoro*. The only way in which a divorce a *vinculo matrimonii* could be obtained in Catholic England was by dispensation from the pope, and subsequently, in Protestant England, by a bill in parliament.¹ Adultery consists in the voluntary sexual intercourse of a married person with another than his or her wife or husband, whether the other party to the intercourse is married or single.² The act must be voluntary and criminal. If there be compulsion, as in the case of a rape; or a mistake excusable in law as a cause of divorce, as when a man has carnal knowledge of a woman not his wife in the belief that she is, or vice versa; or when a person, supposing a former husband or wife to be dead contrary to the fact, contracts and consummates another marriage, the offense which warrants a divorce is not committed.

A man may be convicted of adultery although the offense was committed without the consent of the woman, who was stupefied with liquor.³ The sexual intercourse need not be completed by emission in order to make the act adultery; penetration is sufficient.⁴ A mistake of fact may prevent an act of intercourse from being adultery,

⁰ R. L. ch. 152, secs. 1 and 2.

¹ Blackstone Com. p. 441.

² Com. v. Call, 21 Pick. 509; Com. v. Thompson, 2 Cush. 553.

³ Com. v. Bakeman, 131 Mass. 577.

⁴ Com. v. Hussey, 157 Mass. 415.

as where a woman has connection with a man under the belief that he is her husband, or where she has married the person with whom she has intercourse under the belief that her husband was dead.⁵ But it is otherwise if the intercourse under the second marriage continues after knowledge that the first spouse is living.⁶ A mistake of law is no defense. Belief in the right to have more than one wife would not prevent the intercourse with the latter from being adulterous,⁷ and intercourse after a second marriage, when a divorce from a prior marriage is illegal, is adultery, and ground for a divorce from the prior marriage, though there was a bona fide belief in the validity of the divorce.⁸ Some of the jurists are of opinion that the adultery of the husband ought not to be made subject to the same animadversion as that of the wife, because it is not evidence of such entire depravity, nor equally injurious in its effects upon the morals and happiness of domestic life, that the violation of the marriage vow on the part of the wife is the more mischievous, and that the prosecution ought to be confined to her offense. The early settlers of Massachusetts approved the distinction, and male adultery was held not to be sufficient cause for a divorce.⁹ Adultery in either of the parties is now ground for divorce.¹⁰ The statutes of the commonwealth recognize no distinction between the husband and wife in respect to the gravity of marital offenses when considered as grounds of divorce. Both parties stand alike before the law.¹¹ The court will not take cognizance of a libel for adultery where the parties were married in another state, in which also the adultery was committed, the criminal party still residing in such state.¹² Where parties, who are residents of another state, are married there, and reside there after marriage, and the husband there deserts the wife, and she afterwards removes into this state and resides here five years, the desertion being con-

⁵ *Valleau v. Valleau*, 6 Page, 207.

⁶ *Mathewson v. Mathewson*, 18 R. I. 456.

⁷ *Reynolds v. U. S.*, 98 U. S. 145.

⁸ *Simonds v. Simonds*, 103 Mass. 572; *Leith v. Leith*, 39 N. H. 20; *Palmer v. Palmer*, 1 Sw. & Tr. 551.

⁹ *Hutchinson's Hist.* 1, 445.

¹⁰ St. 1785, ch. 69, sec. 3; R. S. ch. 76, sec. 5; G. S. ch. 107, sec. 6; P. S. ch. 146, sec. 1; R. L. ch. 152, sec. 1.

¹¹ *Cumming v. Cumming*, 135 Mass. 388.

¹² *Carter v. Carter*, 1 Mass. 263; *Hopkins v. Hopkins*, 3 Mass. 158.

tinued during that time, she is not entitled to a divorce, under St. 1838, ch. 126, although she and her husband lived together in this state a part of the time between the marriage and the desertion. The court has no jurisdiction of such a case.¹³ The later statutes provide that a libellant who has resided in this state for five years, and did not remove into this state for the purpose of procuring a divorce, may obtain a divorce for any cause allowed by law, whether it occurred in this commonwealth or elsewhere; and that in no other case shall a divorce be decreed for any cause arising out of this state, unless the parties had previously lived together as husband and wife in this state, and one of them lived in this state when the cause occurred.¹⁴ The court has jurisdiction of a libel for divorce, brought by a husband residing in another state, for the cause of adultery occurring in the commonwealth, where both parties then resided, and where the wife has since remained.¹⁵

22. Circumstantial Evidence Sufficient.

“It is a fundamental rule that it is not necessary to prove the direct fact of adultery, because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable. It is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case, almost, the fact is inferred from circumstances that lead to it by a fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books. At the same time it is impossible to indicate them universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have the most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would

¹³ Brett v. Brett, 5 Met. 233; Harteau v. Harteau, 14 Pick. 181.

¹⁴ Burlen v. Shannon, 115 Mass. 438; R. L. ch. 152, sec. 4.

¹⁵ Watkins v. Watkins, 135 Mass. 83.

lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a harsh and intemperate judgment, moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind if they let themselves loose to subtleties, and remote and artificial reasonings, upon such subjects. Upon such subjects the rational and legal interpretation must be the same.”¹⁶

Lord Stowell's rule is in vogue in this commonwealth, where it has been held that adultery from its very nature is not usually susceptible of direct and positive proof, but is ordinarily established by evidence more or less circumstantial. Direct proof of the carnal act is not necessary; it is sufficient to show circumstances from which the guilt of the parties may reasonably be inferred.¹⁷ The circumstances must be such as to lead the guarded discretion of a reasonable and just man to the conclusion of guilt, not only by fair inference, but as a necessary conclusion.¹⁸ Although presumptive evidence alone is sufficient to establish the fact of adulterous intercourse, the circumstances must lead to it, not only by fair inference, but as a necessary conclusion; appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt. While direct proof of the actual commission of the crime is not required, yet the proximate facts must lead by a fair inference to a necessary conclusion. This is not a necessary conclusion in a strictly mathematical or logical sense. The subject and the conditions of the evidence do not admit of this, but it must be a conclusion so far inevitable as that the supposition of innocence cannot, by any just course of reasoning, be reconciled with it. What may have been satisfactory proof in one case may not be in another, so intricate are human affections, desires, and conditions. The court, therefore, while looking at

¹⁶ Lord Stowell in *Loveden v. Loveden*, 2 Hag. Con. 1, 4 Eng. Eccl. 461; *Thayer v. Thayer*, 101 Mass. 113.

¹⁷ *Com. v. Bowers*, 121 Mass. 45; *Com. v. Gray*, 129 Mass. 474.

¹⁸ *Thayer v. Thayer*, 101 Mass. 113; *Mulock v. Mulock*, 1 Edw. Ch. 14.

all established precedents and following them as much as possible, must always be governed by the particular circumstances of the case. A preponderance of evidence is all that is required, and it is not requisite to prove the allegations beyond a reasonable doubt as in a criminal indictment.

Chief Justice Shaw, in discussing the value of rules for determining the sufficiency of circumstantial evidence in such cases, said: "These rules are useful and convenient in their way, in suggesting general considerations which are applicable to many cases; but, after all, they are to be taken with so many exceptions and so much allowance that in the result each case must depend mainly upon its own peculiar circumstances. It is impossible, therefore, to lay down beforehand, in the form of a rule, what circumstances shall and what shall not constitute satisfactory proof of the fact of adultery; because the same facts may constitute such proof or not, as they are modified and influenced by different circumstances."¹⁹

23. Opportunity and Intent.

There must not only be an opportunity, but there must also exist a mutual desire and intent to commit adultery. Opportunity without satisfactory evidence of the adulterous intent of the suspected parties is insufficient. It is contrary to the usual experience of mankind, not only as gathered in one's own observation, but as disclosed by the reports of such cases, that if such relations exist they should not at some time have incautiously betrayed the fact. Suppose a married woman had been shown, by undoubted proof, to have been in an equivocal situation with a man not her husband, leading to a suspicion of the fact. If it were proved that she had previously shown an unwarrantable predilection for that man; if they had been detected in clandestine correspondence, had sought stolen interviews, made passionate declarations; if her affection for her husband had been alienated; if it were shown that the mind and heart were already depraved, and nothing was wanting but an opportunity to consummate the guilty purpose — then proof that such opportunity had occurred would lead to the satisfactory conclusion that the act had been committed. But when these circumstances are wanting,

¹⁹ *Dunham v. Dunham*, 6 Law Rep. 139.

when there has been no previous unwarrantable or indecent intimacy between the parties; no clandestine correspondence or stolen and secret interviews, the fact of opportunity and equivocal appearances would hardly raise a passing cloud of suspicion over the fair fame of such a woman.²⁰

24. Familiarities — Ante-Nuptial and Post-Nuptial Acts.

The relations between the suspected parties may be shown by evidence of their conduct before and after the filing of the libel, though such evidence tends to establish adultery subsequent to that alleged. Evidence which tends only to the proof of collateral facts will be excluded, but it will be admitted if it has a natural tendency to establish the fact in controversy. It is true that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend, and ordinarily do extend, over a period of time both anterior and subsequent to it. The rules which govern human conduct, and which are known to common observation and experience, are to be applied in these cases, as in all other investigations of fact. The fact that the conduct relied on has occurred since the filing of the libel does not exclude it; and proof of the continuance of the same questionable relations during the intervening time will add to its weight.²¹ Evidence of indecent familiarities with the person with whom adultery is charged, and even of sexual intercourse with him, at other times after marriage, is admissible to explain the character of ambiguous conduct relied on as evidence of the act of adultery in issue. There can be no doubt that evidence of sexual intercourse on the morning of the marriage, and of acts of familiarity shortly before, tends in like manner to explain doubtful conduct shortly after it. It is said that marriage operates as an oblivion of all that is passed, but this rule does not prevent the facts from throwing their natural light on subsequent events.²² In prosecutions for adultery, evidence of prior acts of

²⁰ *Dunham v. Dunham*, 6 Law Rep. 139.

²¹ *Thayer v. Thayer*, 101 Mass. 111; followed in *Com. v. Bean*, 137 Mass. 571; *Parker v. Dudley*, 118 Mass. 602; *Beers v. Jackman*, 103 Mass. 192; *Sullivan v. Hurley*, 147 Mass. 387; *Brooks v. Brooks*, 145 Mass. 574; *Com. v. Bradford*, 126 Mass. 42; *Com. v. McCarthy*, 119 Mass. 354.

²² *Brooks v. Brooks*, 145 Mass. 574; *Com. v. Nichols*, 114 Mass. 285; *Com. v. Merriam*, 14 Pick. 518; *Com. v. Lahey*, 14 Gray, 91; *Com. v. Eastman*, 1 Cush.

adultery is admissible after or in connection with evidence of the particular carnal act charged.²³ Acts of adultery between the defendant and the same woman, near the time of the adultery for which he was indicted, though committed in another place, were held competent to prove the relation and mutual disposition of the parties.²⁴ Such evidence is always open to the objection that it requires the accused to explain other transactions than those charged in the libel; but when offered for the limited purpose of showing a criminal intent in doing the act charged, it has always been held admissible.²⁵

Recapitulation.

The rule is now generally accepted that when the adultery is alleged to have been committed within a limited period of time, it is not necessary that the evidence be confined to that period. Proof of acts anterior to the time alleged, although insufficient of themselves to justify a conviction, may nevertheless be adduced in explanation of other acts of the like nature within that period and in corroboration of the more immediate proof of the carnal act for the purpose of establishing the probability of the adultery having been committed. Criminal intimacy clearly proved between the parties at a later date would materially strengthen the proofs of antecedent adultery. It is in the nature of cumulative evidence to strengthen the circumstantial evidence of alleged previous acts, but the divorce must be granted solely for acts which antedate the libel.

The act of adultery may be proved by evidence that a man and woman occupied the same bed and room, undressed, in the night-time,²⁶ or even that they occupied a room with a bed in it during most of the night.²⁷ The mere fact that the suspected parties were

189; *Simmons v. Simmons*, 5 Notes Cases, 324; *Com. v. Morris*, 1 Cush. 391; *Com. v. Durfee*, 100 Mass. 146; *Com. v. Pierce*, 11 Gray, 447; *Lippitt's Crim. Law*, 134; *State v. Wallace*, 9 N. H. 515; *Com. v. Shepard*, 1 Allen, 575; *Com. v. Tuckerman*, 10 Gray, 173, 200; *Regina v. Dossett*, 2 C. & K. 306; *Com. v. Edgerly*, 10 Allen, 184; *Com. v. Curtis*, 97 Mass. 574.

²³ *Com. v. Thrasher*, 11 Gray, 450.

²⁴ *Com. v. Nichols*, 114 Mass. 285; *State v. Williams*, 76 Me. 480.

²⁵ *Com. v. Eastman*, 1 Cush. 216.

²⁶ *Bromwell v. Bromwell*, 3 Curt. Eccl. 618; *Cadogan v. Cadogan*, 2 Hag. Con. 6, note; *Rix v. Rix*, 3 Hag. Eccl. 74, 5 Eng. Eccl. 21.

²⁷ *Com. v. Clifford*, 145 Mass. 97; *Langstall v. Langstall*, Wright, 148; *Astley v. Astley*, 1 Hag. Eccl. 714.

alone in a room, the doors of which were unlocked, is not sufficient to warrant the inference that adultery was committed.²⁸ But it is otherwise if the parties are found in the same room in a hotel with the doors locked; such conduct being incompatible with innocence.²⁹ Evidence of the defendant's being found in the female defendant's bedroom in a hotel at midnight, he in bed and she not in bed, and with her clothes on, except corsets and shoes, was held sufficient to warrant a conviction.³⁰

25. Stolen and Secret Interviews.

Association and frequent meetings, in the absence of incriminating circumstances, cannot be attributed to an improper purpose, and will not sustain an action for adultery. The visit of a wife to the lodgings of a single man may be a suspicious circumstance, but alone it will not establish guilt. The mere fact also that a married woman, though separated from her husband, receives at her boarding-house visits from two or more men, is not sufficient to render further testimony admissible that their reputation for chastity was bad.³¹ The fact that she rode and walked with certain men without proof of any other fact tending to show criminal intercourse is insufficient evidence of adultery.³²

26. Visiting Brothels.

If a married man visits a house of ill fame, it is presumed that he must have gone there for an improper purpose, and it is generally held to be evidence of adultery.³³ So also if a woman enter a brothel with a man not her husband, or unattended, it alone is sufficient evidence of her adultery. But such visit is open to explanation, as it may have been one of philanthropy or of lawful business, or of accident, the character of the house being unknown to the visitor. The burden of rebutting such strong presumption of adultery rests upon

²⁸ *Alexander v. Alexander*, 2 Sw. & Tr. 102; *Hamerton v. Hamerton*, 2 Hag. Eccl. 8.

²⁹ *Mayo v. Mayo*, 119 Mass. 290; *Wilson v. Wilson*, 154 Mass. 194.

³⁰ *Com. v. Bowers*, 121 Mass. 45.

³¹ *Clement v. Kimball*, 98 Mass. 535.

³² *Maloney v. Piper*, 105 Mass. 233.

³³ *Langstaff v. Langstaff*, *Wright*, 148.

the defendant.³⁴ Evidence of the reputation for chastity of the person with whom the adultery is alleged to have been committed is competent.³⁵

27. Connivance.

If a wife commits adultery with her husband's knowledge or consent, or by his connivance, he cannot obtain a divorce from her for such adultery.³⁶

Condonation.

So if a wife commits adultery, and her husband condones it, she may bring a libel for divorce against him for an act of adultery, subsequently committed by him, and he cannot successfully set up her prior adultery as a defense.³⁷

28. Recrimination.

A husband cannot maintain a libel for divorce against his wife for her adultery, committed after his sentence to imprisonment at hard labor in the state prison for a term of five years or more. A person who has been so sentenced has been guilty of an offense of the same class and degree, under our divorce act, as one who has committed adultery. As soon as the libellant has been so sentenced, the right of his wife to apply for an absolute divorce is complete. Each could, therefore, recriminate against the other. A suitor for divorce cannot prevail if open to a valid charge by way of recrimination of any matrimonial offense whatever, of equal grade, under the statutes.³⁸

Desertion by the wife for the statutory period may be set up in defense of her libel against her husband, charging him with adultery committed after the desertion had become complete.³⁹ But it is otherwise if her desertion had not continued for three years when the

³⁴ *Com. v. Gray*, 129 Mass. 474; *Loveden v. Loveden*, 2 Hag. Con. 24; *Henrick v. Henrick*, 4 Hag. Con. 114.

³⁵ *Com. v. Gray*, 129 Mass. 474; *Astley v. Astley*, 1 Hag. Eccl. 720.

³⁶ *Pierce v. Pierce*, 3 Pick. 299; *Cairns v. Cairns*, 109 Mass. 408; *Morrison v. Morrison*, 136 Mass. 310; Appendix, Form No. 67.

³⁷ *Cumming v. Cumming*, 135 Mass. 386; *Anichini v. Anichini*, 2 Curt. Eccl. 210; *Masten v. Masten*, 15 N. H. 159; *Jones v. Jones*, 3 C. E. Green, 33.

³⁸ *Handy v. Handy*, 124 Mass. 394; *Drummond v. Drummond*, 2 Sw. & Tr. 269.

³⁹ *Hall v. Hall*, 4 Allen, 39.

adultery was committed by him.⁴⁰ And on the trial of a libel for divorce for desertion, evidence, in defense, that the libellant had married another woman before the lapse of five years, and occupied the same house and bed with her for several days, is sufficient proof of his adultery.⁴¹

29. Delay and Insincerity.

Mere lapse of time is not a defense to a libel for divorce. There must be some evidence to show knowledge by the libellant of the breach of the marriage obligation on which the libel is founded; and a failure or omission for an unreasonable period of time to prosecute an action of divorce, in order to defeat the right of a party to a decree dissolving the marriage. It is no defense that the libellant omitted to commence his action for twenty-two years after the guilty act alleged, and cohabited with the libellee during the first eighteen years thereof, when it appears that during the whole term of such cohabitation he was ignorant of the act, and it does not appear precisely at what period of the four years ensuing he first acquired knowledge of it. But unreasonable delay, without satisfactory explanation, strongly indicates collusion, connivance or condonation.⁴²

30. Separation by Mutual Consent.

Living apart by agreement is no bar to a suit for divorce brought by either against the other on the ground of adultery; and it has been uniformly held that, in case of adultery under such circumstances, the innocent party may have a remedy in a suit for a divorce.⁴³ The libellant is not guilty of such a marital wrong as will prevent him from obtaining a divorce for his wife's adultery, but neither could have obtained a divorce for desertion, because the separation was assented to by both parties. Separation by mutual consent carries with it no implied license to commit adultery.⁴⁴

⁴⁰ Walker v. Walker, 172 Mass. 82.

⁴¹ Clapp v. Clapp, 97 Mass. 531.

⁴² Clark v. Clark, 97 Mass. 331.

⁴³ Morrall v. Morrall, 6 P. D. 98; Beeby v. Beeby, 1 Hag. Con. 142, note; Mortimer v. Mortimer, 2 Hag. Con. 310; Franklin v. Franklin, 154 Mass. 515, 13 L. R. A. 843; J. G. v. H. G., 33 Md. 401; Anderson v. Anderson, 1 Edw. Ch. 380.

⁴⁴ Lea v. Lea, 8 Allen, 418-419; Thompson v. Thompson, 1 Sw. & Tr. 231; Franklin v. Franklin, 154 Mass. 515.

31. Insanity.

The insanity of the libellee at the time the adultery was committed is a sufficient ground for dismissing the libel. The offense is not committed voluntarily, and the libellee is incapable of distinguishing between right and wrong or of understanding the nature and consequences of his conduct. Insanity is a full defense for all acts which by the statute are grounds of divorce. There is wanting the consenting will which is indispensable to render the act criminal, and to warrant the court in dissolving the bonds of matrimony.⁴⁵

Permanent and Accidental Insanity.

Every man being presumed to be sane till the contrary is shown, the burden of proof rests, in the first instance, on the party alleging the insanity. But a careful analysis of the principles upon which presumptions are allowed to have force and effect will show that the proof of the insanity of an individual at any particular period does not necessarily authorize the inference of his insanity at a remote subsequent period, or even several months later.

The force of presumptions arises from our observation and experience of the mutual connection between the facts shown to exist and those sought to be established by inference from those facts. Neither observation nor experience shows us that persons, who are insane from the effect of some violent disease, do not usually recover the right use of their mental faculties. Such cases are not unusual, and the return of a sound mind may be anticipated from the subsiding or removal of the disease which has prostrated their minds. It is not, therefore, to be stated as an unqualified maxim of the law, "once insane, presumed to be always insane;" but reference must be had to the particular circumstances connected with the insanity of an individual, in deciding upon its effect upon the burden of proof, or how far it may authorize the inference that the same condition or state of mind attaches to the individual at a later period.

There must be kept in view the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity, and that which may be only temporary. The existence of the former, once established, would require proof from the other party

⁴⁵ *Broadstreet v. Broadstreet*, 7 Mass. 474; *Nichols v. Nichols*, 31 Vt. 328; *Yarrow v. Yarrow*, (1892) L. R. Prob. Div. 92.

to show a restoration or recovery; and in the absence of such evidence insanity would be presumed to continue. But if the evidence only shows a case of insanity directly connected with some violent disease, with which the individual is attacked, the party alleging the insanity must bring his proof of continued insanity to that period which bears directly upon the subject in controversy, and not content himself with proof of insanity at an early period.⁴⁶

Lucid Intervals.

If the adultery was committed during a lucid interval, it is, of course, a cause of divorce, but the burden of proof is upon the party seeking to establish that fact to prove that the act was done during such lucid interval.⁴⁷

Insanity Pendente Lite.

If the libellee has become insane, in the course of a hearing of a libel for a divorce for adultery, the court will proceed no further, without the appointment of a guardian who shall appear for him in the action. The insanity of the libellee pendente lite will not bar the libellant, if the case be fully proved.⁴⁸

32. Marriage of Libellant Before Decree Nisi is Made Absolute.

If a libellant, within six months after the entry of a decree nisi, believing that he has obtained a divorce and is at liberty to marry again, marries another woman, with whom he has sexual intercourse, the second marriage is illegal and void; ⁴⁹ moreover, he is guilty of adultery, and is not entitled to have the decree nisi made absolute.⁵⁰

33. Second Marriage as Evidence of Adultery.

Proof of a second marriage is not sufficient presumptive evidence of

⁴⁶ *Stone v. Damon*, 12 Mass. 488; *Breed v. Pratt*, 18 Pick. 115; *Hix v. Whittemore*, 4 Met. 545; 1 Greenl. Ev. sec. 42; 1 Hale, P. C. 30; *Crowninshield v. Crowninshield*, 2 Gray, 524.

⁴⁷ *Cartwright v. Cartwright*, 1 Phillm. 100.

⁴⁸ *Mansfield v. Mansfield*, 13 Mass. 412; *Rathburn v. Rathburn*, 40 Howard Pr. (N. Y.) 328.

⁴⁹ *Graves v. Graves*, 108 Mass. 314; *Edgerly v. Edgerly*, 112 Mass. 53; *Warter v. Warter*, 15 Prob. Div. 152; *Wickham v. Wickham*, 6 Prob. Div. 11.

⁵⁰ *Moors v. Moors*, 121 Mass. 232; *Cook v. Cook*, 144 Mass. 164; *Darrow v. Darrow*, 159 Mass. 262; *Com. v. Thompson*, 11 Allen, 23.

cohabitation and adultery. It is still necessary to prove cohabitation or actual sexual connection.⁵¹

34. Pleadings Not Evidence.

Where, in cross-libels for divorce a vinculo for adultery, each respondent pleaded in recrimination of the other, it has been held that these pleas could not be received as mutual admissions of the facts articulated in the libels.⁵²

Criminal Conviction. Plea of Guilty.

A record of conviction under a plea of "guilty" of any offense which is a ground of divorce is admissible, it seems, although a cause of divorce cannot be proved by the confessions of the defendant without other evidence. A plea of "guilty" is presumed to have been made by the defendant in person, without coercion and with the opportunity to take the advice of counsel. In a subsequent civil action involving the same subject-matter, his plea is admissible against him, but it is not conclusive, and is subject, like other confessions, to be explained or controverted.⁵³

Plea of Not Guilty.

But if the plea is "not guilty" the record of conviction in the criminal proceedings is inadmissible against the libellee.⁵⁴

Nolo Contendere.

A record showing a conviction on a plea of nolo contendere is not an express confession of guilt, as is a plea of guilty, but is merely an implied confession. This plea, like a demurrer, admits, for the purposes of the case, all the facts which are well stated. The difference between it and guilty appears simply to be, that the latter is a solemn confession which may bind the defendant in other proceedings, and is admissible against him as a judicial admission, while the former is a confession only for the purposes of the particular case. A sentence

⁵¹ Reemie v. Reemie, 4 Mass. 586; Ellis v. Ellis, 11 Mass. 92; Wilson v. Wilson, Wright, 128; Horne v. Horne, 2 Swab. & Tr. 48; Patterson v. Gaines, 6 Howard, 550.

⁵² Turner v. Turner, 3 Greenl. 398; R. L. ch. 173, sec. 85; see Demelman v. Burton, 176 Mass. 363.

⁵³ Burgess v. Burgess, 47 N. H. 395; Green v. Bedell, 48 N. H. 546.

⁵⁴ 1 Greenl. Ev. sec. 527a.

imposed after a plea of *nolo contendere* amounts to a conviction in the case in which the plea is entered, but a record showing a conviction on such a plea is not admissible in another proceeding to show that the defendant was guilty.⁵⁵

35. General Dismissal as a Bar to a Subsequent Libel.

When a libel has been dismissed generally for insufficiency of proof, the libellant cannot maintain a subsequent libel for an adultery that was known to him when the first was brought, without showing a reason for omitting it then.⁵⁶ It is otherwise if new evidence has been discovered, or the wife has been guilty of any misconduct since the dismissal of the first libel.⁵⁷

36. Clandestine Correspondence — Letters of Paramour.

Letters written by the alleged particeps criminis, which were intercepted and never came to the knowledge or possession of the libellee, are not admissible in evidence, although they contain a confession of guilt or disclose a state of feeling tending to prove adultery. Nor are such letters admissible as evidence to contradict the writer's testimony as a witness. Letters addressed to a party, and found in his possession, are not evidence against him of the matters therein stated, unless the contents have been adopted or sanctioned by some reply, or statement, or act done, on his part, and shown by other evidence.⁵⁸ And where one party produces the letter of another, purporting to be in reply to a previous letter from himself, he is bound to call for and put in the letter to which it was an answer, as part of his own evidence.⁵⁹ If the original letter is answered, it is competent evidence

⁵⁵ *Com. v. Horton*, 9 Pick. 206; *Com. v. Tilton*, 8 Met. 232; *Com. v. Ingersoll*, 145 Mass. 381; *White v. Creamer*, 175 Mass. 567.

⁵⁶ *Bartlett v. Bartlett*, 113 Mass. 312.

⁵⁷ *Morrison v. Morrison*, 142 Mass. 361; *Edgerly v. Edgerly*, 112 Mass. 53; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Green v. Green*, L. R. 3 P. & D. 121; *Mortimer v. Mortimer*, 2 Hagg. Con. 310; *Vance v. Vance*, 5 Shepley, 203.

⁵⁸ *Com. v. Eastman*, 1 Cush. 189-215, 48 Am. Dec. 596; *Tillison v. Tillison*, 63 Vt. 411; *Hobby v. Hobby*, 64 Barb. 277; *Razor v. Razor*, 149 Ill. 621; *Com. v. Edgerly*, 10 Allen, 184; *Dutton v. Woodman*, 9 Cush. 262; *Gaskill v. Skeene*, 14 Q. B. 664; *Robinson v. Fitchburg & Worcester Railroad*, 7 Gray, 92; *Rex v. Plumer*, Rus. & Ry. C. C. 264; *People v. Green*, 1 Parker, C. R. 11; 1 Greenl. Ev. sec. 198.

⁵⁹ *Watson v. Moore*, 1 C. & Kir. 626, 47 E. C. L. 626; doubted in *Stone v. Sanborn*, 104 Mass. 319; see also *Trischet v. Hamilton Mutual Insurance Co.*, 14 Gray, 456.

so far as is necessary to understand the reply.⁶⁰ A party to a suit will not be permitted to read in evidence an unanswered letter from himself to the adverse party, for the purpose of proving the truth of facts stated therein, although it was in reply to a letter to himself which he has put in evidence.⁶¹ Press copies of letters are admissible if they purport to have been written by one of the parties, and are found in his possession, and appear to be in his handwriting, and the originals cannot be procured.⁶² The letter book is evidence that the letters copied into it have been sent, but it is not evidence of any other letters in it than those which the adverse party has been required to produce.⁶³

37. Venereal Disease.

The presence of a venereal disease long after marriage is prima facie evidence of adultery.⁶⁴ But the presence of a venereal disease shortly after marriage raises no such presumption, as it may have been contracted before marriage, or be due to secondary syphilis.⁶⁵ A venereal disease is not always due to adultery, but may be attributed to causes consistent with the innocence of both parties.⁶⁶ The husband's adultery will not necessarily be inferred from the fact that the wife has syphilis, because she may have contracted the disease by her own adultery, or by contagion by accidental means, either method being consistent with his innocence.⁶⁷

38. Evidence of the Libellee.

The testimony of the libellee is admissible, but is received with the caution usually accorded evidence proceeding from an interested witness. An instruction commenting on the testimony of the libellee, who was charged with adultery, and stating in substance that formerly

⁶⁰ *Trischet v. Hamilton Mut. Ins. Co.*, 14 Gray, 456.

⁶¹ *Fearing v. Kimball*, 4 Allen, 125, 81 Am. Dec. 690.

⁶² *Com. v. Jeffries*, 7 Allen, 548.

⁶³ *Sturge v. Buchanan*, 2 P. & D. 573; S. C. 10 Ad. & El. 598.

⁶⁴ *North v. North*, 5 Mass. 320; *Johnson v. Johnson*, 14 Wend. 637; *Popkin v. Popkin*, 1 Hagg. 765.

⁶⁵ *Popkin v. Popkin*, 1 Hagg. Con. 765, note; *Morphett v. Morphett*, L. R. 1 P. & D. 702.

⁶⁶ *N. v. N.*, 3 Sw. & Tr. 234; *Stone v. Stone*, 3 Notes Cas. 278; *Ferguson v. Ferguson*, 3 Sandf. 307.

⁶⁷ *Collett v. Collett*, 3 Curt. Eccl. 726.

parties to suits and persons accused of crime were not permitted to testify for fear that such witnesses, from the infirmity of human nature, would not testify to the truth, that a man who committed a crime would certainly lie about it, and a man charged with adultery would swear he was not guilty, tempted both to shield himself, and by a false sentiment of honor to screen the other party to the crime; that a woman who was so depraved as to commit adultery would have no other course but to come forward and deny it, for to stay away would be confession; that such testimony should be received with care, in view of these suggestions, is not error. Such instructions do not invade the province of the jury in weighing the evidence, or express an opinion as to its weight, but only calls the attention of the jury to the peculiar circumstances under which these two classes of witnesses always testified, leaving them to apply the general rule to the case before them.⁶⁸

39. Confessions.

Must be Corroborated.

The libellee's confessions of adultery are sufficient evidence to authorize a decree of divorce, if the circumstances proved by other evidence show there could have been no collusion, but the confession of the party charged uncorroborated by other evidence is insufficient.⁶⁹

Isolated Case.

A divorce a vinculo for the cause of adultery was decreed where the only evidence of the crime was the confession of the guilty party, there being no reason to suspect collusion.⁷⁰ *Billings v. Billings*, supra, is believed to be the only case where no corroborative evidence was required, and is at variance with the weight of authority in other jurisdictions.⁷¹ Adultery may be proved by the direct confession of the defendant, corroborated by evidence of an opportunity to commit it, and his subsequent acts making it probable that he did commit it.⁷²

⁶⁸ *Harrington v. Harrington*, 107 Mass. 329.

⁶⁹ *Tewksbury v. Tewksbury*, 2 Dane Ab. 310; *Baxter v. Baxter*, 1 Mass. 346; *Holland v. Holland*, 2 Mass. 154; 2 Greenl. Ev. sec. 40; 2 Taylor on Ev. sec. 768-769.

⁷⁰ *Billings v. Billings*, 11 Pick. 461.

⁷¹ See criticism in *Summerbell v. Summerbell*, 37 N. J. Eq. 603.

⁷² *Com. v. Tarr*, 4 Allen, 315; *Robinson v. Robinson*, 1 Swab. & T. 362.

Apprehension of Collusion.

Chancellor Kent has said: "The party's confession may and does aid other proofs, but the decree must not rest alone, nor perhaps essentially, on such confessions; for there is great danger of collusion between the parties, or of confession extorted, or made designedly, to furnish means to effect a divorce."⁷³

The rule that confessions are not alone sufficient to establish a charge of adultery is based upon the apprehension of collusion and of imposition upon the court. The amount of corroborative evidence required to overcome this apprehension of collusion varies with the circumstances of each case and the danger of collusion. A confession, if free from suspicion of collusion or duress, or improper influence, or of having been prepared to furnish evidence, may convince to a moral certainty, but it is not legal proof.

Whole Admission Must Be Taken Together.

The general rule is, that where the admission of a party is resorted to as evidence against him, he is at liberty to call out the whole conversation of which the admission was a part, but the additional conversation should be relevant to the matter in issue, and must relate to the point or fact inquired into on the other side.⁷⁴ The whole of what was said on the subject at the particular interview should be stated as a part of the evidence,⁷⁵ but it does not extend to what was said on another and distinct occasion.⁷⁶ If the admission was made in a conversation, the witness should testify to such portions of the conversation as he heard.⁷⁷ If the testimony in a former trial is produced as evidence of an admission, all that is relevant, both in chief and on cross-examination, must be read.⁷⁸ Declarations may be proved by evidence of the language used, but a witness who does not remember the words of an admission may state its substance. The rule does not require the ipsissima verba to be reproduced, but

⁷³ *Betts v. Betts*, 1 Johns. Ch. 197.

⁷⁴ 1 Greenl. Ev. sec. 201; *O'Brien v. Cheney*, 5 Cush. 148; *Whitwell v. Wyer*, 11 Mass. 6, 10; *Fletcher v. Froggatt*, 2 C. & P. 569, 12 E. C. L. 267; *Robinson v. Scotney*, 19 Ves. Jr. 584; *Beckham v. Osborne*, 6 M. & G. 771, 46 E. C. L. 771.

⁷⁵ *Dole v. Wooldredge*, 142 Mass. 161.

⁷⁶ *Adam v. Eames*, 107 Mass. 275; *Judd v. Gibbs*, 3 Gray, 539.

⁷⁷ *Com. v. Pitsinger*, 110 Mass. 101.

⁷⁸ *Com. v. Richards*, 18 Pick. 434, 29 Am. Dec. 608; *Woods v. Keyes*, 14 Allen, 236, 238; *Knowlton v. Moseley*, 105 Mass. 136; *Williams v. Cheney*, 3 Gray, 215.

the declaration or evidence must be given substantially.⁷⁹ If a man speaks of a woman living with him in his house as his wife, it is sufficient evidence of the fact of their cohabitation and adultery.⁸⁰

40. Evidence of Detectives.

The testimony of a detective is weighed and treated the same as any other testimony, but it should be cautiously scrutinized for the purpose of discovering any personal or pecuniary interest he may have. It is proper to ask him what compensation he is to receive for his services, and whether it is contingent on success in establishing the corpus delicti. Such incentive is an open bid for perjured testimony.⁸¹

The testimony of private detectives has been thus characterized: "They may be very useful for some purposes — they may be instrumental in detecting malpractices which would otherwise remain concealed — but they are most dangerous agents. Police detectives are most useful. They are employed in a government establishment; they are responsible to an official superior; they have no pecuniary interest in the result of their investigations beyond the wages which they receive for the occupation that they follow, and they may be and are constantly employed, not only with safety, but with benefit to the public. But when a man sets up as a hired detective of supposed delinquencies, when the amount of his pay depends on the extent of his employment, and the extent of his employment depends on the discoveries he is able to make, then that man becomes a most dangerous instrument."⁸²

41. Name of Particeps Criminis.

The particeps criminis must be named, or there must be an averment that he is unknown to the libellant.

The objection that naming the alleged particeps criminis in the pleadings might possibly scandalize an innocent party is untenable.

⁷⁹ *Hale v. Silloway*, 1 Allen, 21; *Kittredge v. Russell*, 114 Mass. 67; *Ruch v. Rock Island*, 97 U. S. 693; *Costigan v. Lunt*, 127 Mass. 354, 357.

⁸⁰ *Clapp v. Clapp*, 97 Mass. 531; *Com. v. Holt*, 121 Mass. 61; *Williams v. Williams*, 1 Hag. Con. 229.

⁸¹ *Com. v. Trainor*, 123 Mass. 414; *Com. v. Mason*, 135 Mass. 555; *Com. v. Ingersoll*, 145 Mass. 231.

⁸² *Sopwith v. Sopwith*, 4 Sw. & Tr. 243.

The name of the person with whom the adultery was committed must be given, if known: if unknown, it should be so averred. The defect, however, may be amended, in accordance with the facts, by setting out the name of the adulterer, or by stating that such name is unknown.⁸³

In the case of *Brown v. Brown*, the counsel proposed that a witness should be allowed to testify that he knew the party to have committed the crime of adultery, but without naming the person with whom the adultery was committed, but the court said that they should inquire of him with whom it was committed, and added that if it appeared from his testimony that he was the paramour, they should recommend to the district attorney to lay the case before the grand jury, in order that an indictment might be found against him.⁸⁴

When the name is alleged to be unknown, the offense must be identified by other particulars, such as the description of the unknown person, or such designation of time, place, and circumstances as will enable the libellee and the court to distinguish the particular offense charged.⁸⁵ Not all the particulars will be required in such a case if the libellant alleges that the exact time and place are unknown, but it will be sufficient to allege that the offense was committed in a certain town or city between specified dates.⁸⁶ A libel for divorce is sufficient where time and place are specified with as much certainty as a party can be reasonably expected to furnish, without setting out the evidence in detail, which he is not required to do. The charge of adultery, whether by way of crimination or recrimination, should be stated in the pleadings in such a manner that the adverse party may be prepared to meet it at the trial of the issue.

If the name of the *particeps criminis* is said to be unknown, the evidence must prove such to be the fact,⁸⁷ and it may be alleged that

⁸³ *Church v. Church*, 3 Mass. 157; *Choate v. Choate*, 3 Mass. 391; *Richards v. Richards*, Wright, 302; *Bird v. Bird*, Wright, 98; *Sanders v. Sanders*, 25 Vt. 713; *Germond v. Germond*, 6 Johns. Ch. 347; *Kane v. Kane*, 3 Edw. Ch. 389; *Wood v. Wood*, 2 Page, 108.

⁸⁴ 5 Mass. 320; R. L. ch. 152, sec. 41; *Moulton v. Moulton*, 13 Me. 110; *Foster v. Pierce*, 11 Cush. 439.

⁸⁵ *Heyde v. Heyde*, 4 Sandf. 692; *Mitchell v. Mitchell*, 61 N. Y. 409; *Miller v. Miller*, 5 C. E. Green. 216.

⁸⁶ *Mitchell v. Mitchell*, 61 N. Y. 409; *Scheffling v. Scheffling*, 44 N. J. Eq. 438.

⁸⁷ *Miller v. Miller*, 5 C. E. Green, 216.

the name of the *particeps criminis* is unknown, although it might easily have been ascertained.⁸⁸ If, however, the name is given, evidence of an unknown person or of another person will be insufficient.⁸⁹ Where a libel alleged the act of adultery to have been committed without the state, with a person to the libellant unknown, and there was an appearance for the respondent, evidence was admitted of adultery committed at a place within the commonwealth.⁹⁰ But if the libel for a divorce alleges an act of adultery on one day and with a certain person, the court will permit an amendment charging the act on another day with another person.⁹¹ The fact that the alleged paramour was within reach of process at the time of the trial, and was not called to testify, is significant, and corroborative of other evidence of guilt.⁹² It is otherwise, however, if the libellee proves her inability to procure the paramour's testimony.⁹³

Libel.

Naming a person with whom the libellant has committed adultery in a divorce proceeding before a court having jurisdiction of the parties and subject-matter is absolutely privileged, and is not actionable.⁹⁴

42. Appearance of Particeps Criminis.

In all libels of divorce for the cause of adultery, the person alleged to be *particeps criminis* with the libellee may appear and contest the libel. The paramour is also a competent witness.

The statute of 1890, ch. 370, allowed the *particeps criminis* to appear, in the discretion of the court, when the libellee did not appear or was defaulted. The right was thus restricted to the non-appearance or default of the libellee after having appeared, and the discretion of the court to which, as in all matters of discretion, no exception could be taken. Accordingly, if the libellee appeared and contested

⁸⁸ *Com. v. Sherman*, 13 Allen, 248.

⁸⁹ *Bokel v. Bokel*, 3 Edw. Ch. 376; *Washburn v. Washburn*, 5 N. H. 195.

⁹⁰ *Washburn v. Washburn*, 8 Mass. 131.

⁹¹ *Tourtlot v. Tourtlot*, 4 Mass. 506.

⁹² *Bibby v. Bibby*, 33 N. J. Eq. (6 Stew.) 56.

⁹³ *Pond v. Pond*, 132 Mass. 219; *Graham v. Graham*, 50 N. J. Eq. 701.

⁹⁴ *Jones v. Brownlee*, 53 L. R. A. 445.

the libel, the *particeps criminis* under that statute had no standing in court. But the amendment of that act by St. 1898, ch. 487, allowed the *particeps criminis* to appear as a matter of right in all cases of adultery, whether the libellee appeared or not. No such right exists in the absence of statute.⁹⁵

The paramour or co-respondent is a competent witness, but if sworn he will be asked if he committed adultery with the libellee, and not merely if he knew that she had committed adultery.⁹⁶ The testimony of a *particeps criminis*, although not entitled to the weight which would be given to the evidence of a fair and disinterested witness, is nevertheless competent and entitled to consideration. The failure to call the paramour as a witness creates a presumption against the libellee, who may show that she was unable to procure the testimony of the alleged paramour.⁹⁷ Where the paramour was called, but refused to testify, such fact may be commented upon in argument.⁹⁸

It is a general rule of law that a witness is not bound to criminate himself, but he must claim his privilege at the outset, when the testimony he is about to give, if he answers fully all that pertains to it, will expose him to a criminal prosecution. If the *particeps criminis* submit himself to testify about the very matter tending to criminate himself, without claiming his privilege, he waives it, and must submit to a full cross-examination. If he states a particular fact in favor of the party calling him, he is bound to relate all the circumstances appertaining to that fact, although in so doing he may expose himself to a criminal charge.⁹⁹ It is within the discretion of the court, and the usual practice, to advise a witness that he is not bound to criminate himself, when it appears necessary to protect his rights. If, after having advised him generally, it appears to the presiding justice that the witness intends to insist upon his privilege, but does not understand his right, it is competent for the court to instruct the witness fully as to his privilege, otherwise the witness, through ignorance or misunderstanding, would be obliged to criminate

⁹⁵ R. L. ch. 152, sec. 9.

⁹⁶ *Brown v. Brown*, 5 Mass. 320; followed in *Moulton v. Moulton*, 13 Me. 110.

⁹⁷ *Pond v. Pond*, 132 Mass. 219; *Graham v. Graham*, 50 N. J. Eq. 701.

⁹⁸ *Mayo v. Mayo*, 119 Mass. 290.

⁹⁹ *Foster v. Pierce*, 11 Cush. 437, 439; 1 Greenl. Ev. sec. 451.

himself.¹⁰⁰ An admission of an alleged paramour of a prior adultery with the libellee, made in the libellee's presence, and not denied, is admissible; but it is otherwise if the declarations and admissions are made in the absence of the libellee.¹⁰¹ A paramour, while in the office of a hotel with the wife, requested the clerk to assign them connecting rooms. The wife was near, but it did not appear that she heard the conversation. It was held that the evidence was inadmissible. Declarations or confessions of one party are inadmissible to affect the other, when not made in his presence nor communicated to him. For the same reasons evidence of an adulterous disposition of one party should be excluded, unless it be directly connected with the conduct of the party sought to be charged with the offense.¹⁰² The adulterous disposition of a party may be shown by proof of solicitations and attempts to commit adultery.¹⁰³

43. Specifications of Adultery.

A bill of particulars or specifications will be ordered by the court, in its discretion, when a party pleads adultery or any cause of divorce with too great generality.

It is now a general rule, perfectly well established, that in all legal proceedings civil and criminal, bills of particulars or specifications of facts may and will be ordered by the court upon motion, whenever it is satisfied that there is danger that otherwise a party may be deprived of his rights, or that justice cannot be done. It is based upon the great principle of affording full opportunity to a party accused of any illegal act to understand the nature of the charge, and to prepare his defense, and it is the duty of the presiding judge as fully to secure these objects as the nature of the case will admit, and to protect a vigilant party from being surprised by evidence in relation to a subject not anticipated, and which he has not had the opportunity to meet and repel.¹⁰⁴ Where a libel for a divorce charged, generally, that the respondent had committed various acts of adultery at divers

¹⁰⁰ *Foster v. Pierce*, 11 Cush. 437; *Com. v. Price*, 10 Gray, 472; *Mayo v. Mayo*, 119 Mass. 290.

¹⁰¹ *Pond v. Pond*, 132 Mass. 219; *Com. v. Pitsinger*, 110 Mass. 101; *Croft v. Croft*, 3 Hag. Eccl. 318; *Sanborn v. Gale*, 162 Mass. 412.

¹⁰² *Pond v. Pond*, 132 Mass. 219; approved in *Tillison v. Tillison*, 63 Vt. 411.

¹⁰³ *Forster v. Forster*, 1 Hag. Con. 144; *Soilleux v. Soilleux*, 1 Hag. Con. 373.

¹⁰⁴ *Gardner v. Gardner*, 2 Gray, 439.

times, with persons unknown, during a period of eight years, the court ordered the libellant to file a bill of particulars.¹⁰⁵ Whether such an order shall be made is a question within the discretion of the court where the cause in which it is asked for is pending, to be judged of and determined upon the peculiar facts and circumstances attending it. Such a decision is final in the court where it is made, and is not open to reëxamination or revision. It concludes the rights of all parties who are affected by it; and he who has furnished a bill of particulars or specifications must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special declaration.¹⁰⁶ Evidence, therefore, of acts of adultery not mentioned in the specifications is inadmissible, and should be rejected.¹⁰⁷

44. Amendments Discretionary.

It is also discretionary with the court to allow the libel, specifications or any of the pleadings to be amended with or without terms during the trial, and its decision is not subject to exception.¹⁰⁸

45. Effect of Divorce for Adultery on Legitimacy.

A divorce for adultery committed by the wife shall not affect the legitimacy of the issue of the marriage, but such legitimacy, if questioned, shall be tried and determined according to the course of the common law.¹⁰⁹

Ancient Rule.

The ancient rule was that the husband was conclusively presumed to be the father if he was within the four seas during any part of the usual period of gestation, although the wife was proved to have been at the same time guilty of infidelity.¹¹⁰

¹⁰⁵ *Adams v. Adams*, 16 Pick. 254.

¹⁰⁶ *Com. v. Snelling*, 15 Pick. 321; *Com. v. Giles*, 1 Gray, 466; *Harrington v. Harrington*, 107 Mass. 329; *Com. v. Wood*, 4 Gray, 11; *Gardner v. Gardner*, 2 Gray, 434; *Cochrane, Petitioner*, 10 Allen, 276.

¹⁰⁷ *Com. v. Giles*, 1 Gray, 466.

¹⁰⁸ *Ford v. Ford*, 104 Mass. 198; *Harrington v. Harrington*, 107 Mass. 329.

¹⁰⁹ St. 1785, ch. 69, sec. 6; R. S. ch. 76, sec. 20; G. S. ch. 107, sec. 27; P. S. ch. 146, sec. 23; R. L. ch. 152, sec. 22.

¹¹⁰ 1 Greenlf. Ev. sec. 28; *R. v. Murrey*, 1 Salk. 122; *R. v. Allerton*, 1 Ld. Raym. 122; 1 Black. Com. 457; *Coke's Littleton*, 244.

Modification of Rule.

The severity of the "quatuor maria" rule has been done away with in modern times, and a doctrine adopted more conformable to reason, and more in accordance with what seems to have prevailed at the earliest period of the law. Lord Raymond, in 1732, was the first judge to decide that the legal presumption of the husband's access might be controverted by other evidence.¹¹¹

Lord Ellenborough, in 1807, modified this rule still farther, and enumerated five instances in which the illegitimacy of the child could be shown in cases of adulterine bastardy:

First. Where the husband was under the age of puberty.

Second. Where the husband was incompetent or labored under some bodily infirmity.

Third. Where the husband had died at such a time that he could not have been the father.

Fourth. Where the husband was entirely absent from the realm during the period in which the child must, in the course of nature, have been begotten, thus proving the non-access of the husband.

Fifth. Where the husband in the course of nature could not have been the father of his wife's child, as in Foxcrofts' case, where it was held that the child of the wife of an infirm, bedridden man, who had married in that state twelve weeks before her delivery, was a bastard.¹¹²

Any evidence is admissible to rebut the presumption of legitimacy which proves the impossibility of the husband's paternity.

Modern Rule.

The modern rule, which is characterized by its good sense, is, that to bastardize the issue of a married woman it must be shown beyond all reasonable doubt that there was no such access as could have enabled the husband to have been the father of the child.¹¹³ If, therefore, on a complaint under the bastardy act seeking to charge one with being the father of a child begotten upon a married woman while

¹¹¹ *Pendrell v. Pendrell*, 2 Stra. 925 (1732); 2 Kent Com. (14th ed.) *211.

¹¹² *Foxcrofts' Case*, 1 Roll. Abr. 359; *Rex v. Luffe*, 8 East. 207; *Hargrave v. Hargrave*, 9 Beav. 552.

¹¹³ *Hemmenway v. Towner*, 1 Allen, 209; *Sullivan v. Kelley*, 3 Allen, 148; *Philips v. Allen*, 2 Allen, 453; *Cross v. Cross*, 3 Paige Ch. 139; *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375; *Egbert v. Greenwalt*, 44 Mich. 245.

she was living with her husband, a verdict of guilty, rendered under an instruction to the jury simply that the burden of proof is on the complainant to satisfy the jury that the husband was not the father, the verdict will be set aside.¹¹⁴

The word "access," when used with respect to husband and wife, means sexual intercourse. It is not access in the ordinary acceptance of the word, but access between husband and wife viewed with reference to the results, namely, the procreation of children.¹¹⁵ Non-access of the husband need not be proved during the whole period of the wife's pregnancy. It is sufficient if the circumstances of the case show a natural impossibility that the husband could be the father, as where he had access only a fortnight before the birth.¹¹⁶

Non-access Not Provable by Husband or Wife.

When parties are lawfully married, neither of them can be allowed to testify that the offspring of the mother is spurious.¹¹⁷ The declarations of the husband or wife that they had no connection, though living together, and that therefore their progeny is illegitimate, are uniformly excluded on the ground of decency, morality and public policy.¹¹⁸ The presumption of the law is that the husband had access to the wife, and this presumption must be overcome by the clearest evidence that it was impossible for him to have had access to the wife, or to be the father of the child. Testimony of either of the parents, even tending to show such fact, or of any fact from which such non-access could be inferred, or of any collateral fact connected with this main fact, will be scrupulously kept out of the case; and such non-access and illegitimacy must be clearly proved by evidence aliunde.

Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this not so much from the fact that it reveals immoral conduct upon the part of the parents as because of

¹¹⁴ Phillips v. Allen, 2 Allen, 453.

¹¹⁵ Cent. Dict.; Webster's Dict.; Banbury Peerage Case, 1 Sim. & S. 153.

¹¹⁶ The King v. Luffe, 8 East, 207.

¹¹⁷ Canton v. Bentley, 11 Mass. 443; Haddock v. Boston & Maine R. Co., 3 Allen, 298; Anonymous v. Anonymous, 22 Beav. 481; Cope v. Cope, 5 C. & P. 604.

¹¹⁸ Hemmenway v. Towner, 1 Allen, 209; Clapp v. Clapp, 97 Mass. 531; 1 Greenl. Ev. sec. 253 and 344.

the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby.¹¹⁹

Recapitulation.

Evidence that a child is born during wedlock is sufficient to establish its legitimacy. The burden of proof is upon the party seeking to establish the contrary, and the presumption of legitimacy can only be overcome by evidence which proves the fact beyond all reasonable doubt. Illegitimacy can not be established by the testimony of the husband or the wife, but must be clearly proved by evidence aliunde.

46. Effect of Divorce on Rights of Property.

Absolute divorce at common law barred dower and curtesy.

An absolute divorce at common law put an end to all rights dependent upon the marriage and not actually vested, such as dower in the wife, curtesy in the husband, and the right of the husband to reduce to possession his wife's choses in action.¹²⁰

Note Collected After Divorce.

The wife's choses in action, not reduced to possession during coverture, remained her property, and she could recover the proceeds of a promissory note belonging to her at the time of marriage, but not collected until after a divorce a vinculo.¹²¹

Divorce A Mensa et Thoro.

A divorce a mensa et thoro at common law does not alter the relation of the parties, and therefore does not bar dower.¹²² By the common law, the wife's adultery was not a bar, nor was it a cause of divorce from the bonds of matrimony; so that her mere adultery could not be made a bar by means of a divorce. The statute of Westminster required a voluntary residence away from her husband with

¹¹⁹ *Hemmenway v. Towner*, 1 Allen, 209; *Clapp v. Clapp*, 97 Mass. 531; *Cope v. Cope*, 5 C. & P. 604.

¹²⁰ *Co. Litt.* 32a and n. 194; 2 Bl. Com. 130; 4 Kent Com. 52, n. c, 54; *Barrett v. Failing*, 111 U. S. 523; *Barber v. Root*, 10 Mass. 260; *Hood v. Hood*, 110 Mass. 463.

¹²¹ *Legg v. Legg*, 8 Mass. 99.

¹²² *Dean v. Richmond*, 5 Pick. 461; 2 Bl. Com. 130.

an adulterer to constitute a bar.¹²³ But by our statutes, if she is simply guilty of adultery, the husband may procure a divorce, and thus bar her dower, or if he sees fit he may omit to do anything, and leave her right unimpaired. In this commonwealth a woman is not barred of her right to dower by leaving her husband and living with an adulterer.¹²⁴

Husband's Interest at Common Law and Under the Statutes.

At Common Law.

A husband, at common law, had a right to make his wife's property his own by reducing it to his possession during coverture, and there was no authority in the absence of statute to compel him to return any portion of it to her after a divorce.

Early Statutes.

Statutes were passed empowering the court, upon a divorce for any cause except her adultery, to restore to her all her real estate and the whole or any part of her personal property that came to her husband by reason of the marriage, or award to her the value thereof in money to be paid by the husband.¹²⁵

Property settled upon a husband by a trust deed made by the wife after their marriage, in settlement of differences between them, does not come to him by reason of the marriage, within the meaning of the statute which authorized the restoration to a divorced wife of the whole or any part of her personal estate that came to the husband by reason of the marriage. Such a transaction will not be set aside on account of the husband's adultery where the deed of settlement contains no condition that he should continue chaste.¹²⁶

Recent Statutes.

The real and personal property of a married woman remains her separate property, and she may receive, receipt for, hold, manage and dispose of real and personal property in the same manner as if she were sole. A husband no longer has a right to make his wife's prop-

¹²³ 13 Edw. I, ch. 24; 1 Bl. Com. 441.

¹²⁴ Lakin v. Lakin, 2 Allen, 45; Reynolds v. Reynolds, 24 Wend. 193; Bryan v. Batcheller, 6 R. I. 546.

¹²⁵ Kriger v. Day, 2 Pick. 316; Dean v. Richmond, 5 Pick. 461; G. S. ch. 107, secs. 40 and 41; P. S. ch. 146, secs. 24 and 25.

¹²⁶ Chase v. Phillips, 153 Mass. 17.

erty his own by reducing it to his possession, and his acts will not deprive her of her title or of her right to enforce it.¹²⁷

Upon a divorce for adultery committed by the wife, her title to her separate real and personal property during her life shall not be affected, except that the court may decree to the husband so much of such property as it considers necessary for the support of the minor children of the marriage who may have been decreed to the husband's custody; and if the wife afterward contracts a lawful marriage, the interest of the divorced husband in the wife's separate real and personal property, after her death, shall cease, except in so much thereof as may have been decreed to him.¹²⁸

Trust Estates.

It has been held, where the parties conveyed the real estate of the wife to a trustee for the wife's benefit during her life, with a life interest in the husband, should he survive her, and to her heirs on the decease of both, making him substantially tenant by the curtesy, that he lost no rights under this settlement by a divorce for his adultery, and that he would be entitled, if he survived her, to the use of this property during his life.¹²⁹ A divorce does not affect the rights of property acquired under a marriage settlement, in the absence of provisions to that effect in the instrument itself. The general provision of law by which the wife would be entitled to the possession of her property is controlled by the indenture.¹³⁰ Accordingly, a divorce terminates the interest of a wife in an annuity assigned to her before marriage by the prospective husband, to be held by her "during the continuance of the marriage," although the divorce was granted because of the husband's cruelty.¹³¹

Wife's Interest.

After a divorce a wife shall not be entitled to dower in the land of her husband, unless, after a decree of divorce nisi granted upon

¹²⁷ R. L. ch. 153, sec. 1; *McCowan v. Donaldson*, 128 Mass. 169; *Ago v. Canner*, 167 Mass. 390.

¹²⁸ R. L. ch. 152, sec. 23; Report of Commissioners to Consolidate the Pub. Sts., note.

¹²⁹ *Babcock v. Smith*, 22 Pick. 61.

¹³⁰ *Babcock v. Smith*, 22 Pick. 61.

¹³¹ *Harvard College v. Head*, 111 Mass. 209.

the libel of the wife, the husband dies before such decree is made absolute, except that, if the divorce was for the cause of adultery committed by the husband or because of his sentence to confinement at hard labor, she shall be entitled to her dower in the same manner as if he were dead.¹³² A wife divorced for the adultery of her husband is entitled to dower in all the lands of which he was seised at any time during coverture, although he has conveyed them since the divorce.¹³³ The wife must obtain her dower as if the husband were dead, as the court in which the divorce proceedings are pending will not assign it upon the libel.¹³⁴ A decree of divorce, binding as between the husband and wife, cannot be impeached by her in a writ of dower against persons who purchased land from him during the coverture.¹³⁵

Homestead Rights.

If the wife acquires homestead in certain real estate, and if, after she has ceased to live with her husband, she obtains an absolute divorce from him, he continues to occupy the premises, no order having been made in regard to the land in the divorce proceedings, she may recover possession of them from him by a writ of entry.¹³⁶

Beneficiary After Divorce.

If a husband has his life insured in a beneficiary association, the by-laws of which provided that after payment of the expenses of the funeral and the last sickness the balance should be paid to the person designated by the member in his application for membership, or last legal assignment, provided such person was an heir or member of the decedent's family, and if either of the persons designated should die the sum which would have been payable to him if he had lived should be paid to the widow of the designator for the use of herself and her minor children, and he designated his wife as his beneficiary, who afterwards obtained a divorce from him, whereupon he changed the designation to his son and married sister, the insurance will be pay-

¹³² R. L. ch. 152, sec. 24.

¹³³ Davol v. Howland, 14 Mass. 219.

¹³⁴ Smith v. Smith, 13 Mass. 230; Merrill v. Shattuck, 58 Me. 370; R. L. ch. 132, sec. 1.

¹³⁵ Hood v. Hood, 110 Mass. 463.

¹³⁶ Dunham v. Dunham, 128 Mass. 34.

able to the son, as the wife did not become a widow, and the married sister was not a member of his family or dependent on him for support.¹³⁷

Voidable Marriages.

A voidable marriage is good for every purpose, and on the husband's death the wife is entitled to dower, but after being declared null the parties have no rights in each other's property.

Divorce in Another State Bars Dower and Curtesy.

The language of the divorce statutes relating to dower and curtesy is general, and applies to all divorces, whether granted in the state or elsewhere, and a foreign decree of divorce entered by a tribunal having jurisdiction of the parties is given the same effect as if granted in the state.¹³⁸

¹³⁷ Tyler v. Odd Fellows' Mut. Relief Assoc., 145 Mass. 134.

¹³⁸ Legg v. Legg, 8 Mass. 98; Barber v. Root, 10 Mass. 260; Hood v. Hood, 110 Mass. 465; Moran v. Somes, 154 Mass. 200; R. L. ch. 152, sec. 35.

CHAPTER IV.

IMPOTENCY.

SECTION.

47. Impotency as a Cause of Divorce.
48. Inspection and Physical Examination.
49. Copula not Fruitfulness is the Test.
50. Must Exist at the Time of the Marriage.
51. Incurability.
52. Knowledge of Defect.
53. When Proceedings Must be Instituted.
54. Absence or Denial of Sexual Intercourse.
55. Burden of Proof.
56. Pleading.

47. Impotency in General.

Impotency, to be a ground of divorce, must be of such a nature as to render copulation impossible. Capacity to copulate, not fruitfulness, is the test. The incapacity must exist at the time of the marriage and be incurable.

Defined Generally.

Impotence is the incurable physical incapacity of either spouse for the act of copulation. When the defect is natural, the legal presumption is that it existed at the time of the marriage, but a contrary presumption arises when it is merely accidental.

The incapacity of either party to consummate the marriage contract, by reason of a defect of physical organization or infirmity, is made by our statute a cause of divorce from the bonds of matrimony.¹ By the ecclesiastical law of England, and by the laws of some of our states, such a cause, existing at the time of the marriage, renders the contract voidable, and it may be declared void ab initio by a sentence of nullity.²

Few Decisions Upon the Subject of Impotency.

There are but few decisions in this state or in this country upon the subject of impotency, so that recourse must be had to the English authorities for an exposition of the subject. This paucity of adjudi-

¹R. L. ch. 152, sec. 1; P. S. ch. 146, sec. 1; Gen. Sts. ch. 107, sec. 6; R. S. ch. 76, sec. 5; St. 1785, ch. 69, sec. 3.

²Elliott v. Gurr, 2 Phillim, 16, 19; 1 Eng. Ec. 166.

ocations is in part due to the fact that the parties were originally precluded from being witnesses, which reduced the number of cases in court and made it extremely difficult to prove the existence of this impediment; besides which, one need not be a profound physiologist to know how rarely the structure of the body is deficient for the purposes of our nature. Persons also aware of their matrimonial unfitness will ordinarily remain single, or when those who are ignorant of their incapacity do marry, the injured party will not always complain. This defect is said to be more common in men than in women. Lord Stowell said in the Consistory Court of London that three suits had been brought by the man within the last sixty years, and that these had been unsuccessful, as was also the one then before him.³ Sir John Nicholl observed in the Court of Arches that there had been but one suit by the husband within his recollection.⁴

48. Inspection and Physical Examination.

The ecclesiastical court, whenever it was necessary to prove the condition of the genital organs, ordered what was termed an inspection of the person by physicians, acting under oath as quasi officers of the court, whose duty it was to examine the private parts of the parties and report whether or not they were capable of consummating the marriage, and whether or not the woman gave evidence of having had connection with man.

The authority of divorce courts, in determining a question of impotence as affecting the validity of a marriage, to order an inspection by surgeons of the person of either party, rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction; and is derived from the civil and canon law as administered in spiritual and ecclesiastical courts, not proceeding in any respect according to the course of the common law.⁵ The practice which prevailed in the ecclesiastical court has never obtained in this commonwealth, where

³ Briggs v. Morgan, 3 Phillim. 321; 1 Eng. Ec. 408; 2 Hag. Con. 324.

⁴ Norton v. Seton, 3 Phillim. 141; 1 Eng. Ec. 384-386.

⁵ Briggs v. Morgan, 2 Hagg. Con. 324; S. C. 3 Phil. 325; Devanbagh v. Devanbagh, 5 Page, 554; 3 L. Ed. 827; Le Barron v. Le Barron, 35 Vt. 365.

there is no law which compels either party to submit to such an examination, and is only referred to for purposes of historical information. If, however, the party should refuse so reasonable a request as a submission to an inspection, it would be a matter of argument by counsel, and would be considered by the court as bearing on his good faith, as in other cases of a party declining to produce the best evidence in his possession, but the court has no power to enforce it.⁶

The power of a court to grant an order compelling a physical examination in cases of personal injury has been often questioned, and the tendency of recent decisions is to deny that such power exists. The right was emphatically denied by Cooley, J. "It should be understood," he observed, "that there are some rights which belong to men as men and to women as women which in civilized communities they can never forfeit by becoming parties to divorce or any other suit, and there are limits to the indignities to which parties to legal proceedings may be lawfully subjected."⁷

The supreme court of the United States has denied the power of the court to issue and enforce an order to a party in a suit, compelling him to submit his person to an examination of surgeons without his consent and in advance of the trial, holding such extraordinary proceedings to be without authority of the common law or the statutes of the United States, and without precedent in common usage. Justice Gray, delivering the opinion of the court, quoted Judge Cooley's remark that "the right to one's person may be said to be a right of complete immunity, to be let alone," that by the common law every individual had the right to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law; and that "the inviolability of the person is as much invaded by compulsory stripping and exposure as by a blow. To compel one, and especially a woman, to lay bare the body, or submit to the touch of a stranger, without

⁶ *Turquand v. Strand Union*, 8 Dow. P. C. 201, S. C. 4 Jur. 74; *Clifton v. United States*, 4 How. 242, 11 L. Ed. 957; *Bryant v. Stilwell*, 24 Pa. 314; *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 250; *Illinois Cen. R. Co. v. Griffin*, 80 Fed. Rep. 278; *Freeport v. Isbell*, 93 Ill. 381; *Stack v. N. Y., N. H. & H. R. Co.*, 177 Mass. 155, 159; S. C. 52, L. R. A. 328; *McQuigan v. Delaware, Lackawanna & Western Railroad*, 129 N. Y. 50; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401; 2 Western Law Journal, 131.

⁷ *Page v. Page*, 51 Mich. 88.

authority, is an indignity, an assault and a trespass; and no order or process commanding such exposure or submission was ever known to the common law in administration of justice between individuals, except in a very small number of cases, based upon special reasons and upon ancient practice, coming down from ruder ages, and mostly obsolete in England, and never, so far as we are aware, introduced in this country.”⁸

Guilty Knowledge.

When an impotent person, knowing his defect, induces a person not cognizant of it to marry him, he commits thereby a gross fraud and a grievous injury; and, even if himself ignorant of it, there is equally a violation of the contract, and equally an injury, though without intentional wrong. In the former case the marriage would be clearly voidable on the sole ground of fraud, if the principles governing other contracts were applied to it; in the latter case it would seem to be equally voidable on the ground of mistake, and the violation of implied warranty. But owing to the peculiar nature of marriage, this infirmity, though sometimes treated as a pure fraud, is, according to the better opinion, to be regarded in a somewhat different aspect, yet as presenting some of the elements of fraud.⁹

49. Ability to Copulate.

The parties must be physically capable of consummating the marriage. Ability to propagate the species is not, however, as might be supposed, the test of the requisite physical condition. If the parties are able to have sexual intercourse, the requirements of the law are satisfied. Copula, not fruitfulness, is the test.¹⁰ There must be an impotentia copulandi on the part of the man or of the woman, proceeding from malformation, frigidity, disease, or some other like

⁸ Union Pacific Ry. Co. v. Botsford, 141 U. S. 250; approved in Stack v. New York, etc., Railroad, 177 Mass. 155; 52 L. R. A. 328; Cooley on Torts, 29.

⁹ 1 Bishop on M. D. & Sep. sec. 763.

¹⁰ D—— v. A——, 1 Rob. Ecc. 279, 298; Anon., Deane & S. 296; Briggs v. Morgan, 3 Phillim. Ecc. 325; E—— v. T——, 33 Law J. Mat. Cas. 37; Devanbagh v. Devanbagh, 5 Paige, 554, 28 Am. D. 443; J. G—— v. H. G——, 33 Md. 401, 3 Am. Rep. 183; Keith v. Keith, Wright, 518; Bascomb v. Bascomb, 25 N. H. 267; Norton v. Norton, 2 Aiken, 188; Powell v. Powell, 18 Kan. 371; Payne v. Payne, 46 Minn. 467, 49 N. W. 230; Anonymous, 89 Ala. 291, 7 South. 100, 18 Am. St. Rep. 116, 7 L. R. A. 425.

cause. The law recognizes the procreation of children as one of the ends of matrimony, but it refuses to annul a marriage merely because one of the parties is incapable of procreation.¹¹

50. Date of Defect.

Impotency must exist at the time of the marriage in order to constitute the cause of divorce intended by the statute, although the statute does not expressly so declare. There is no other fair and reasonable construction of the law, and such has been the ruling on similar statutes in England and in this country, but the question has never been judicially determined in this state.¹² If the impotency arises subsequently to the marriage the divorce will not be granted, because then the element of fraud and imposition is wanting.¹³

51. Incurability.

The infirmity or physical defect must be incurable. If curable, or the obstruction complained of can be removed by a slight surgical operation, or by other appropriate remedies, endangering neither life nor health, the cause is wholly insufficient.¹⁴

52. Knowledge of Defect.

It is a principle of justice and reason that no man can take advantage of his own wrong. A party who knows that he is impotent, or has some incurable defect, cannot marry and afterwards have the marriage declared null or vacated by a decree of divorce. The impotency must have been unknown at the date of the marriage to the party complaining.¹⁵ If the marriage with an impotent person was void instead of voidable, other reasons would apply.¹⁶

¹¹ *Deane v. Aveling*, 1 Rob. Ecc. 279.

¹² *Bascomb v. Bascomb*, 25 N. H. 267 (5 Fost.); *Ferris v. Ferris*, 8 Conn. 166; *Devanbagh v. Devanbagh*, 5 Paige, 554, 28 Am. D. 443; *Dane's Ab. ch. 46, art. 1, sec. 3*; *Powell v. Powell*, 18 Kan. 371; *Greenstreet v. Cumyns*, 2 Phil. Ec. C. 10; *Brown v. Brown*, 1 Hagg. Eccl. 523.

¹³ *Bascomb v. Bascomb*, 5 Fost. 267 (25 N. H.), reviewing authorities.

¹⁴ *Bascomb v. Bascomb*, 25 N. H. 267; *Ferris v. Ferris*, 8 Conn. 166; *Griffith v. Griffith*, 162 Ill. 368; *Devanbagh v. Devanbagh*, 6 Paige, 175; *Anonymous*, 35 Ala. 226, 229; *G. v. G.*, 33 Md. 401.

¹⁵ *Norton v. Seaton*, 3 Phillim. 147; *H. v. B.*, 6 P. D. 13.

¹⁶ *Miles v. Chilton*, 1 Rob. Ec. 684.

53. When Proceedings Must be Instituted.

The validity of such a marriage can only be questioned in the lifetime of both of the parties, and by the person who suffers an injury from it. The wife may choose to live with the impotent husband, and then he cannot avoid the duties of the marital relation, such as support and cohabitation, by having the marriage dissolved.¹⁷

Delay or Insincerity.

Mere cohabitation, with knowledge of the impotency, consummation remaining impossible, does not, on account of acquiescence, bar the suit in the ordinary case. But unreasonable delay indicates insincerity, and tends to impeach the good faith of the libellant. Long acquiescence with knowledge, or the means of procuring knowledge, would operate as a bar to the prosecution of such suit.¹⁸ The law does not permit the parties to cohabit while the suit is pending, whatever its merits or anticipated results.¹⁹

54. Absence or Denial of Sexual Intercourse.

Neither the absence nor the refusal of sexual intercourse suffices to prove impotency, not even if coupled with the fact that the parties occupied the same bed nightly for weeks, and that the alleged incompetent person had admitted inability to have sexual intercourse.²⁰

But refusing connection may under proper circumstances be evidence from which impotency will be inferred. At the trial of a libel for divorce by a husband against his wife, alleging impotency, it appeared that the parties had occupied the same bed for a period of ten years, both being in good health; that the marriage had never been consummated by any act of sexual intercourse; that the husband had often tried to have intercourse with his wife, but she utterly refused to permit it, giving no reason for her refusal; that the husband did not know that the wife was physically incapable of the act of sexual intercourse; and that the wife refused to submit to an examination as to her physical capacity. A female witness testified that the wife had said to her that she "could not have connection with any man,"

¹⁷ P. v. S., 37 L. J. Mat. Cas. 80.

¹⁸ M. v. H., 3 Swab. & T. 592; G. v. M., 10 App. Cas. 171; 53 L. T. 398.

¹⁹ Chapman v. Chapman, 10 C. E. Green, 394.

²⁰ Ferris v. Ferris, 8 Conn. 166.

but gave no reason or explanation why she could not. Held, that this statement of the wife, taken together with the other evidence, would justify a finding that the charge in the libel was proved; and that a ruling that the evidence would not, in law, justify such a finding, was a subject of exception.²¹

55. Burden of Proof.

The burden of proof is on the complaining party to show both the incurable nature of the impotence and its existence at the time of the marriage. The evidence must satisfy the court that when the marriage took place there existed an incurable impediment to its consummation.²² The common rule applicable in all litigation is, that he who maintains the affirmative of the issue must prove it, as a negative is, in general, incapable of proof. If there is a failure to prove the affirmative, the opposite proposition or negative of the issue is to be considered as established.²³

56. Pleading.

The libel must allege that the impotency existed at the time of the marriage, and that the malformation or defect was, and is, incurable; otherwise a demurrer will be sustained, but leave to amend will be given.²⁴

²¹ *Merrill v. Merrill*, 126 Mass. 228.

²² *Cuno v. Cuno*, Law Rep. 2 H. L. Sc. 300.

²³ Stephen on Pl. *84; 1 Greenl. Ev. sec. 74.

²⁴ *Roe v. Roe*, 29 Pittsb. Leg. J. 319; *A. C. v. B. C.*, 10 Wkly. Notes Cas. 569; see Appendix Forms Nos. 31, 32, 33, 34, and note, and 35 and note.

CHAPTER V.

DESERTION AS A CAUSE OF DIVORCE.

SECTION.

57. Desertion in General.
58. Abandonment and Cessation of Cohabitation.
59. Denial of Sexual Intercourse, not Desertion.
60. Offer of Reconciliation.
61. Right of Husband to Determine the Family Domicil.
62. Period of Abandonment.
63. Intent to Abandon.
64. Abandonment Must Have Been without Consent of the Abandoned Spouse.
65. Abandonment Must Have Been Unjustifiable.
66. Evidence.
67. Pleading.

57. Desertion in General.

Desertion is withdrawal from cohabitation by one of the parties, with intent to abandon the other, without the other's consent, and without justification. In detail, to entitle an abandoned husband or wife to a divorce for desertion:—

- (a) There must have been a cessation of cohabitation.
- (b) The cohabitation must have ceased for the entire statutory period.
- (c) There must have been an intent to abandon.
- (d) There must have been no consent on the part of the abandoned spouse.
- (e) There must have been no misconduct on the part of the abandoned spouse justifying the abandonment.¹

Desertion was never recognized by the ecclesiastical law of England as a sufficient ground for divorce. The unwritten law which our forefathers brought hither did not allow divorces for desertion. The remedy was a suit in the spiritual courts for the restitution of conjugal rights.² The proceedings were in personam, and the deserting party was compelled to return to cohabitation, if the other, says Blackstone, "be weak enough to desire it."³ The decree was

¹ St. 1838, ch. 126; St. 1857, ch. 228; Gen. Sts. ch. 107, sec. 7; P. S. ch. 146, sec. 1; R. L. ch. 152, sec. 1.

² Orme v. Orme, 2 Add. Ec. 382.

³ 3 Bl. Com. 94; Scott v. Scott, 4 Swab. & T. 113.

enforced by imprisonment, which was continued until full compliance was exacted.⁴ Under the present Divorce Act (47 and 48 Vict., ch. 68), the defendant cannot be imprisoned, but the decree provides for the payment of alimony in case cohabitation is not resumed.⁵

The ecclesiastical law, in its entirety, was not adopted as a part of our common law. There has never been in this country any tribunal with jurisdiction to administer that law, which has practically remained in abeyance. Jurisdiction in such cases is conferred only by statute. Such statutes are original provisions and not declaratory of the common law, which did not permit an absolute divorce or a decree of separation for desertion.⁶

The effect of marriage is that the contracting parties are mutually entitled to cohabitation and intercourse. It is true that in this country no suit will lie for restitution of conjugal rights, and that, in the absence of statute, there is no legal remedy by which an abandoned spouse can either compel the other to return or be released from the marital relation. An abandoned wife has certain powers which she does not possess while cohabiting with her husband, as the power to purchase necessities on her husband's credit, if she can obtain them; but most of her disabilities remain notwithstanding the abandonment, and the rights of her husband in her property continue.⁷ This is the rule at common law, but it has been changed to some extent by statutes making desertion a ground for divorce. Desertion consists in the willful and unjustifiable abandonment of one of the spouses by the other, without the other's consent. The cessation of matrimonial cohabitation is never treated as desertion, unless it is both intentional and wrongful. The mere fact that the parties are living apart does not even raise a presumption of desertion.⁸

Sir Cresswell defined the term desertion as used in the English Divorce Act as follows: "Without attempting to lay down a precise definition, I think it undoubtedly must mean a willful absenting of

⁴ *Lakin v. Lakin*, 1 Spinks, 274; *Barlee v. Barlee*, 1 Add. Eccl. 301.

⁵ *Swift v. Swift*, 15 Prob. & Div. 118; *Crothers v. Crothers*, L. R. 1 P. & D. 568; *Harding v. Harding*, 11 Prob. & Div. 111.

⁶ *Burtis v. Burtis*, 1 Hopkins, 557.

⁷ *Mayhew v. Thayer*, 8 Gray, 172; *Eames v. Sweetser*, 101 Mass. 78; *Lockwood v. Thomas*, 12 Johns. 248; 1 Bl. Com. 442.

⁸ *Pidge v. Pidge*, 3 Met. 251.

himself by the husband; and that such absence and cessation of cohabitation must be in spite of the wish of the wife.”⁹

Desertion is the most common cause of divorce, as will appear from an examination of statistics based upon the annual returns which the clerks of the superior court for the several counties are required by law to make to the secretary of the commonwealth.¹⁰ This is largely due to the fact that the practitioner, when there are several causes, usually selects this one as the ground for the application, as desertion is not difficult to prove, and the decree does not stigmatize the libellee. A divorce for adultery will tend to prevent a reconciliation, and leaves a most undesirable record for the parties and their children. If, also, one party is impotent, the public exposure of the facts and the introduction of indelicate evidence may be avoided by alleging desertion when the time is ripe for it, and property rights are not involved. And this course may properly be pursued with a due regard for the rights of the parties and the general public.

To constitute such a desertion as will entitle the aggrieved spouse to a divorce, there must be (1) a cessation of cohabitation (2) for three consecutive years next prior to the filing of the libel, (3) an intention to abandon, (4) want of consent on the part of the person abandoned, and (5) the abandonment must be unjustifiable. These are the elements of a “desertion” as the term is used in the divorce laws.

58. Abandonment and Cessation of Cohabitation.

Matrimonial cohabitation is the living together of a man and woman ostensibly as husband and wife.¹¹ The abandonment sufficient to warrant a decree of divorce must be complete as respects the marital relation, but not necessarily to the exclusion of all social intercourse. The parties may communicate with each other personally or by correspondence, advise and consult one another, transact any business between themselves, or do any other thing not inconsistent with a state of entire separation as husband and wife, even to the extent of either party furnishing the other with pecuniary assistance.

⁹ *Thompson v. Thompson*, 1 Swab. & Tr. 231.

¹⁰ St. 1882, 194; R. L. ch. 152. sec. 42.

¹¹ *Commonwealth v. Calef*, 10 Mass. 153; *Dunn v. Dunn*, 4 Paige, 425, 428.

Desertion was originally a cause of divorce from bed and board only, as is evident from many early statutes.¹²

The statute of 1838, ch. 126, was the first statute which made desertion a cause of divorce from the bond of matrimony in this commonwealth. It was expressly provided by that act that the guilty party should have "willfully and utterly" deserted the other for the term of five years consecutively, "and without the consent of the party deserted." The phraseology was changed in the statute of 1857, ch. 228, and the words "willfully and utterly" were omitted, as they have been in subsequent revisions of the statutes. The court, however, in *Southwick v. Southwick*,¹³ expressed the opinion that this alteration was not made with an intention to change the degree or kind of desertion which should be deemed an adequate ground for divorce, and held that the word desertion in the statute does not signify merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract.¹⁴

It was held under this statute that where a wife was compelled to leave her husband by his extreme cruelty and gross neglect to provide a suitable maintenance for her, and the separation continued for the statutory period, the wife was not entitled to an absolute divorce for desertion, but was confined to the lesser remedy of a divorce from bed and board. The court refused to grant an absolute divorce under the circumstances for the reason that it would be extending the operation of the statute beyond its real intendment.¹⁵

Putnam, J., in a dissenting opinion, has held the contrary doctrine, which generally obtains in other jurisdictions: "Now, to all legal and reasonable intendment, the wife who is obliged to fly from her husband's violence and house into the street, for her preservation, is to be considered to be there not of her own free will, but by reason of the force and violence of her husband. He has driven her from him ;

¹² St. 1785, ch. 69, sec. 3; St. 1810, ch. 119; Rev. St. ch. 76, sec. 6.

¹³ 97 Mass. 327.

¹⁴ *Ford v. Ford*, 143 Mass. 578.

¹⁵ *Pidge v. Pidge*, 3 Met. 257; *Fera v. Fera*, 98 Mass. 155; *Lea v. Lea*, 99 Mass. 493; compare *Lynch v. Lynch*, 33 Md. 328; *Styles v. Styles*, 52 N. J. Eq. 446; *Hesler v. Hesler*, Wright, 210; *Kershaw v. Kershaw*, 5 Pa. Dist. R. 551.

and I hold that it would be a perversion of terms to say that she, under those circumstances, deserted him. * * * Having done the outrage, the husband leaves her to go into the world without house, home, or shelter, food or raiment, support, protection, or aid from him. * * * I call this desertion."¹⁶

"We confess," says a reviewer, "it seems to us difficult to resist this conclusion."¹⁷

The omission by the legislature from the Public Statutes of the provisions formerly contained in St. 1857, ch. 228, sec. 2, and in Gen. Sts., ch. 107, sec. 7, permitting a libel to be brought in certain cases by the deserting party, manifests an intention on its part not only to limit divorces for desertion to cases in which the libellant has actually been deserted by the other party, but to exclude cases in which the libellant was the deserting party, even though such desertion had been caused by the misconduct of the other party.¹⁸

The Time of Imprisonment May or May Not Be Included.

Whether the time during which a husband is imprisoned for crime should be included in estimating the statutory period of desertion depends upon the facts and circumstances of each particular case.

A divorce may be decreed for desertion although the guilty party during the statutory period has been several times committed under sentence to the house of correction, on proof that during the intervals between the several commitments he neither returned to the society of his wife nor contributed anything to her maintenance and support. The intent to desert having been proved to exist before the first commitment, is presumed to continue in the absence of evidence to the contrary, and is not interrupted by the imprisonment.¹⁹ If, however, the husband, during his imprisonment, corresponded with his wife and made attempts to induce her to return when released, an intent to desert will not be presumed.²⁰

¹⁶ Per Putnam, J., in *Pidge v. Pidge*, *supra*.

¹⁷ 7 Boston Law Reporter, 19.

¹⁸ *Padelford v. Padelford*, 159 Mass. 281; R. L. ch. 152, sec. 1; P. S. ch. 146, sec. 1.

¹⁹ *Hews v. Hews*, 7 Gray, 279; *Hall v. Hall*, 4 Allen, 39; *Apthorpe v. Apthorpe*, 29 L. J. Mat. Cas. 27; *Drew v. Drew*, 13 Prob. Div. 97.

²⁰ *Townsend v. Townsend*, L. R. 3 P. & D. 129; see *Wolf v. Wolf*, 38 N. J. Eq. 128.

There is a cessation of cohabitation although a husband may continue to support his wife, if they have ceased to live together.

There is no more important right of the wife than that which secures to her, in the marriage relation, the companionship of her husband and the protection of his home. His willful denial of this right, with the intentional and permanent abandonment of all matrimonial intercourse, against her consent, is desertion, within the meaning of our statute; and such conduct is not relieved by the fact that he has from time to time contributed to her support and the support of her children. A man may do as much as this from motives of charity, or deference to the opinion of others, or in order to discharge, in part, a legal responsibility for the means of living furnished her, although he may all the time have a fixed intention permanently to abandon all personal relations with her.²¹ Although the permanent denial of the right of the wife may be aggravated by leaving her destitute, or mitigated by a liberal provision for her support, yet, if cohabitation is put an end to, against the consent of the wife, with no intention of renewing it, the matrimonial offense of desertion is complete.²²

A husband also may obtain a divorce for desertion when he has been abandoned by his wife, although he supported her during the separation. A mere provision for her support or a division of property for the same purpose, or to avoid a suit for separate maintenance, will not be conclusive evidence that he agreed to the separation. In such a case a divorce for desertion will be decreed to him if he has not in fact consented to the separation.²³

But a decree of the probate court, upon a wife's petition on the Pub. Sts., ch. 147, sec. 33, for separate maintenance, adjudging that she is living apart from her husband for justifiable cause, is, while it remains in force, a bar to a libel for a divorce on the ground of desertion. The fact determined by it is inconsistent with the necessary allegation in the libel, that the libellee previously had utterly deserted the libellant, and was then continuing such desertion. Utter desertion, which is recognized by the statute as a cause for divorce, is a

²¹ *Magrath v. Magrath*, 103 Mass. 577.

²² *Yeatman v. Yeatman*, Law Rep. 1 P. & D. 489.

²³ *Macdonald v. Macdonald*, 4 Sw. & T. 242.

marital wrong. Because the deserter is a wrongdoer the law gives the deserted party a right to a divorce. If a wife leaves her husband for a justifiable cause it is not utter desertion within the meaning of the statute, and a wife who has utterly deserted her husband, and is living apart from him in continuance of such desertion, cannot be found to be so living for justifiable cause.²⁴

A verdict and judgment are conclusive by way of estoppel only as to facts, without the existence and proof or admission of which they could not have been rendered.²⁵ A decree in favor of the wife, which recited that she, "for justifiable cause, was actually living apart from her husband," was held not to prevent the husband from obtaining a divorce for adultery, as the question of the wife's adultery, not having been necessarily involved and determined in the issue tried in the probate court, the judgment of that court was not conclusive against a libel for divorce afterward brought by the husband for the adultery of the wife. The decree is binding and conclusive in this suit in regard to all matters shown to have been put in issue or to have been necessarily involved in the former suit, and actually tried and determined in it. In regard to matters not then in controversy, and not heard and determined, although it is conclusive so far as the final disposition of that cause of action is concerned, it is not conclusive to prevent a determination of them according to the truth if they are subsequently controverted in a different case. The decree could not be held to be a bar to a divorce, unless the only facts which would render the decree possible are such as would of themselves preclude the libellant from obtaining a divorce.²⁶

59. Denial of sexual intercourse on the part of either the husband or the wife is not desertion or such an abnegation of the duties of the marital relation as to be a cause of divorce, or of nullity of marriage.

It has been held that the refusal of matrimonial intercourse, although unjustified by considerations of health or physical disability, inasmuch as it was a breach or violation of a single conjugal or marital duty only, would not support a libel for divorce on the

²⁴ *Miller v. Miller*, 150 Mass. 111.

²⁵ *Lea v. Lea*, 99 Mass. 493.

²⁶ *Watts v. Watts*, 160 Mass. 464; *Lyster v. Lyster*, 111 Mass. 328.

ground of desertion, when it had continued for the statutory period. The word desertion in the statute does not signify merely a refusal of matrimonial intercourse, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract. The husband, in this case, sought a divorce for desertion. It appeared in evidence that his wife did not actually leave his abode until about two years before the filing of the libel, when she left without his knowledge or consent. She had lived in the same house with him for more than three years before her departure, and attended to her usual household duties. In no other respect did she treat him as her husband, and professed to regard him only as a "boarder." She occupied separate rooms, refused to cohabit with him, denied all intercourse, and declared that she would never live with him again. The libel was dismissed on the ground that the evidence did not make out a case of utter desertion.²⁷

Emery, J., in delivering the opinion of the court in *Stewart v. Stewart*, 78 Me. 548, said: "Decisions are cited from the courts of some other states which seem to hold the contrary doctrine. There is a difference between the statutes of those states and our statute. Our statute uses the phrase, "utter desertion." The statutes upon which the opposing decisions are based omit the word utter. The language of our statute, enacted in 1883, is the same verbatim as that in the Massachusetts statute, which had already received judicial construction in *Southwick v. Southwick*. The inference is that our legislature, in using the same language, intended the same construction. Sexual intercourse is only one marital right or duty. There are many other important rights and duties. The obligations the parties assume to each other and to society are not dependent on this single one. Many of these obligations, fidelity, sobriety, kind treatment, etc., have legal sanctions, and can be enforced, or their breach remedied by legal process. This obligation in question is of a nature so personal and delicate, and dependent so much on sentiment and feeling, that the English ecclesiastical courts, though reaching far into the

²⁷ *Southwick v. Southwick*, 97 Mass. 327; approved and followed in *Stewart v. Stewart*, 78 Me. 548; *Schoessow v. Schoessow*, 83 Wis. 553; *Fritz v. Fritz*, 138 Ill. 436; *Anonymous*, 52 N. J. Eq. 349; *Segelbaum v. Segelbaum*, 39 Minn. 258; criticised in 1 Bishop on Mar., Div. and Sep., sec. 1680.

privacy of domestic life, have stopped short of this. We do not think our legislature intended to call the denial of this one obligation an "utter desertion," while the party might be faithfully and perhaps meritoriously fulfilling all the other marital obligations."

Sexual intercourse is, therefore, not the principal element of marriage to which the rest is but ancillary. It may be urged with no little force that the refusal of such intercourse by one of the parties to the marriage is such a violation of marital duty that it ought to be regarded as a good ground of divorce, yet the question is simply as to the meaning of the statute. The word "desertion" is used in the sense of "abandon" to the extent that the deserted party must be deprived of all real companionship and every substantial duty which the other owes to him or her. It would degrade the marriage relation to hold that it is abandoned when sexual intercourse ceases. The lawfulness of that intercourse is perhaps a prominent and distinguishing feature of married life. The higher duty of unity of life, interest, sympathy, and companionship have an important place in it, as well as the thousand ministrations to the physical comforts of the parties, by each in his or her sphere, in consideration of the marriage obligation, and without ceaseless thought of pecuniary recompense. These factors may possibly exist in other relations of life, but not in all their completeness. They are all necessary to the perfect marriage relation. A divorce may be had when substantially all of these duties and amenities have been abandoned by the guilty party, which alone constitutes "utter desertion" within the purview of the statute.

In the ecclesiastical courts which had jurisdiction of matrimonial causes desertion was not a ground for divorce, but the remedy was a suit for the restitution of conjugal rights, where either party separated from the other without sufficient cause, in which case the court would compel the parties to come together again, if either party was weak enough to desire it contrary to the inclinations of the other.²⁸

In these courts, however, a clear distinction is made between marital cohabitation and sexual intercourse, and the jurisdiction extended no further than to enforce the former.²⁹

²⁸ 3 Bl. Com. 94.

²⁹ *Forster v. Forster*, 1 Hag. Con. 144; *Weldon v. Weldon*, 9 P. D. 52-56.

The precise question arose in *Orme v. Orme*.³⁰ It was a libel by the wife for restitution of marital rights. It appeared that the husband lived with her in the same house, but refused to have sexual intercourse with her. The libel was dismissed on the ground there was no power in the court to remedy such a refusal. "There is no doubt," said Sir C. Cresswell, "after the case of *Orme v. Orme*, that although this court enforces conjugal cohabitation, it does not pretend to enforce marital intercourse. The reasons why it does not embark in such an attempt are sufficiently obvious."³¹

In this country the remedy for desertion or abandonment, and the breaking up of the matrimonial relations for the statutory period, without lawful cause, is divorce; and the tenor of the decisions, following the distinction above referred to, is not to recognize the denial of marital intercourse by either of the parties as in itself a ground of divorce, either under the head of desertion or cruelty, nor will it justify desertion or other marital dereliction, but it is a right to be enforced in *foro conscientiae*.³²

The utter denial of sexual intercourse on the part of the wife is not cruel and abusive treatment entitling the husband to a divorce under the Statute of 1870, ch. 404, sec. 2; neither is it a cause for annulling the marriage. The cruelty charged must be personal violence, or appear to be such as shall cause injury to life, limb, or health, or create a danger of such injury, or a reasonable apprehension of such danger.³³ The refusal of marital intercourse without sufficient reason is a wrong, and cannot be justified, but it is not sufficient to excuse either adultery or desertion on the part of the person deprived of these rights. A wife, for similar reasons, is not warranted in leaving her husband because he is incapable of satisfying her sexual desires.³⁴

³⁰ 2 Addams, 382.

³¹ *Rowe v. Rowe*, 4 Swab. & T. 162.

³² *Southwick v. Southwick*, 97 Mass. 327; *Stewart v. Stewart*, 78 Me. 548; *Cowles v. Cowles*, 112 Mass. 298; *Steele v. Steele*, 1 MacArthur (D. C.) 505; *Schoessow v. Schoessow*, 83 Wis. 553; *Fitz v. Fitz*, 138 Ill. 436; *Segelbaum v. Segelbaum*, 39 Minn. 258; *Morrison v. Morrison*, 20 Cal. 432; *Eshbach v. Eshbach*, 23 Pa. St. 343; *Reid v. Reid*, 21 N. J. Eq. 331; *Kennedy v. Kennedy*, 87 Ill. 250; *Magill v. Magill*, 3 Pittsb. (Pa.) 25; Anonymous, 52 N. J. Eq. 349; 2 Kent's Com. (14th ed.) 128, note; *Watson v. Watson*, 52 N. J. Eq. (7 Dick.) 349.

³³ *Cowles v. Cowles*, 112 Mass. 298; *D'Aguilar v. D'Aguilar*, 1 Hagg. Ecc. 773; *Cousen v. Cousen*, 4 Swab. & Tr. 164; *Magill v. Magill*, 3 Pittsb. (Pa.) 25.

³⁴ *Milliner v. Milliner*, Wright, 719.

60. Offer of Reconciliation.

When either spouse, after having deserted the other, but before the expiration of the statutory period of three years, offers in good faith to return, but is refused, such refusal, unless justified, will constitute desertion.

A refusal to renew cohabitation after a separation by consent is, if the other elements are present, a desertion on the part of the one so refusing. A consent to a separation is revocable. If, therefore, one party seeks a reconciliation and offers to return, but the other declines to renew the cohabitation, the party declining the offer is not entitled to relief, but in law becomes a deserter. A husband who has causelessly deserted his wife may in good faith seek a reconciliation, and if the wife, under such circumstances, refuses to live with him again, without good cause, she becomes from that time the party in the wrong, and has no longer any authority to pledge his credit even for necessities, more than she would have had if she had herself originally left him without cause.³⁵

Where a woman had left her husband on account of his habits of intoxication, but he afterward reformed, offered her a good home, and invited her to return, but she declined, it was held by Wilde, J., that assuming her leaving him originally to be justifiable, her subsequent refusal to return on the cause being removed was a desertion. It cannot be the intent of the law to hold a man forever to the consequences of an early fault, curable in its nature, and cured in fact.³⁶ So, also, a wife who has wrongfully left her husband may return to him, and his refusal to receive her will be desertion on his part.³⁷

If both parties are in fault, or both guilty of matrimonial offenses, the one refusing an offer to resume cohabitation is guilty of desertion.³⁸ The offer, in order to have such effect, must be made before the period of desertion is complete and the other party has acquired

³⁵ *Hankinson v. Hankinson*, 33 N. J. Eq. 286; *Walker v. Loughton*, 31 N. H. 111; *Crow v. Crow*, 23 Ala. 583; *Child v. Hardyman*, 2 Stra. 875; *McGahay v. Williams*, 12 Johns. 293; *McCutchen v. McGahay*, 11 Johns. 281; *Friend v. Friend*, Wright, 639.

³⁶ *Hills v. Hills*, 6 Law Reporter, 174; see *Walker v. Loughton*, 31 N. H. 111.

³⁷ *Fellows v. Fellows*, 31 Me. 342.

³⁸ *Bradley v. Bradley*, 160 Mass. 258; *Poor v. Poor*, 8 N. H. 307; *Kimball v. Kimball*, 13 N. H. 222; *Seaver v. Seaver*, 2 Sw. & Tr. 665.

a right to a divorce.³⁹ The offer to return must be made in good faith, under circumstances conducive to reconciliation, with the desire that the offer be accepted, and not for the sole purpose of obtaining advantage in a pending suit.⁴⁰ The offer to return also should not be accompanied by improper conditions.⁴¹

It is expressly provided by statute that no libel for divorce on the ground of desertion shall be defeated by a temporary return or other act done by the party deserting, if it appears that such return or other act was not made or done in good faith, but with the intent to defeat the obtaining of a divorce by the other party.⁴² If the separation was caused by the misconduct of one of the parties, who requests the other to return after a cause of divorce has accrued, such a request, under the circumstances, is of no legal effect, because the aggrieved party is not obliged to condone the offense.⁴³

There is always a locus poenitentiae until the right to a divorce is complete.⁴⁴ Until then the deserting spouse may return, or offer to return, and the other must permit it. An offer to renew cohabitation, made in good faith by the deserting spouse at any time before the separation has lasted for the statutory period, will bar a divorce, though refused by the deserted party.⁴⁵ Such a refusal of itself constitutes desertion. But an offer to return, made after the desertion has lasted for the statutory period, will be too late, because then the matrimonial offense is complete, and a cause of divorce has accrued.⁴⁶

61. Right to Determine Family Domicil.

The husband has the right to fix or change the family domicil, and the refusal of his wife to follow him, without justifiable cause, will amount to desertion.

The general rule is that the domicil of the husband is the domicil of the wife, or, as stated by Mr. Justice Wilde, "the wife could not

³⁹ *Mallinson v. Mallinson*, L. R. 1 P. & D. 93; *Basing v. Basing*, 3 Swab. & T. 516; *Cargill v. Cargill*, 1 Swab. & T. 235.

⁴⁰ See *Walker v. Walker*, 172 Mass. 84.

⁴¹ 9 A. & E. *Encycl. of L.* (2d ed.) p. 774 and cited cases.

⁴² R. L. ch. 152, sec. 19.

⁴³ *Sargent v. Sargent*, 36 N. J. Eq. 644.

⁴⁴ *Walker v. Walker*, 172 Mass. 84; *Clapp v. Clapp*, 97 Mass. 533.

⁴⁵ *Brookes v. Brookes*, 1 Swab. & T. 326.

⁴⁶ *Cargill v. Cargill*, 1 Swa. & T. 235.

acquire a domicile separate from her husband, and although they lived apart, she still followed his domicile.”⁴⁷ He has the power to establish the family domicile, and she must follow him, or her refusal to do so, without sufficient excuse, will amount to desertion. Even a promise before marriage not to take her away from the neighborhood of her mother and friends is not binding, and does not justify her refusal to accompany him to a new domicile.⁴⁸ But it must appear that the husband requested the wife to follow him to the new home selected by him, and that she refused without having any lawful excuse. The wife is bound to follow the fortunes of her husband, and to live where he chooses to live, and in the style and manner which he may adopt. If the husband has not provided a home at the new domicile, the wife is not guilty of desertion in refusing to follow him.

A husband is not guilty of desertion because he fails to follow the wife to a new domicile selected by her. The law which assigns the voluntary absence of the husband for the statutory period as a cause of divorce must not be so construed as to require him to follow her to such places as she may for any cause see fit to select for a residence in order to escape the imputation of willful desertion.⁴⁹

62. Period of Abandonment.

A divorce from the bond of matrimony was originally allowed for willful and utter desertion for five consecutive years next prior to the filing of the libel.⁵⁰ The statutory period was subsequently reduced to three years.⁵¹ The cessation of cohabitation must continue during the whole period prescribed by the statute in order to entitle an abandoned husband or wife to a divorce. If cohabitation is resumed even for the shortest period, and again ceases, the desertion must be calculated from the time of the last abandonment. In other words,

⁴⁷ *Greene v. Greene*, 11 Pick. 410; *Hood v. Hood*, 11 Allen, 199; *Dolphin v. Dolphin*, 7 H. L. Cas. 390; *Yelverton v. Yelverton*, 1 Sw. & T. 574; *Pitt v. Pitt*, 4 Macq. App. Cas. 627; *Firebrace v. Firebrace*, 4 Prob. Div. 63; *Dalhousie v. McDonall*, 7 Cl. & F. 817; *Budlen v. Shannon*, 115 Mass. 447; *Watkins v. Watkins*, 135 Mass. 85; *Masten v. Masten*, 15 N. H. 159.

⁴⁸ *Franklin v. Franklin*, 154 Mass. 515; *Schouler*, Dom. Rel. secs. 37 and 38; *Walker v. Loughton*, 31 N. H. 111.

⁴⁹ *Frost v. Frost*, 17 N. H. 251.

⁵⁰ St. 1838, ch. 126; Gen. St. ch. 107, sec. 7.

⁵¹ P. S. ch. 146, sec. 1; R. L. ch. 152, sec. 1.

when a desertion has been condoned it is not revived by a subsequent desertion, as in the case of the revival of condoned cruelty.⁵²

Where a wife who had abandoned her husband returned occasionally to look after her children, and perform domestic duties, it was held that this was not a renewal of cohabitation; ⁵³ but where a wife returned and performed domestic duties for several years, living in the same house with her husband, he was denied a divorce for desertion.⁵⁴ A husband may have been abandoned by his wife for more than seven years, and yet not be entitled to a divorce for desertion, if for any cause the presumption of her death has not arisen, and he has married and cohabited with another woman, thus being guilty of adultery, which will bar his libel for her desertion.⁵⁵ So, also, a wife who has been deserted for the statutory period cannot maintain a libel for desertion if it appears that she has married again, although she knew that her husband was alive, and that the bonds of matrimony had not been dissolved by a divorce. The fact that she consulted a clergyman, who informed her that her marriage had "run out," and that she had a legal right to marry again, will be no justification, it being a mistake of law, and not a mistake of fact.⁵⁶

63. Intention to Abandon.

The mere cessation of cohabitation for the time prescribed in the statute is not desertion, unless there is also an intention to abandon. The cessation of cohabitation and the intent to abandon must concur. The intent to desert is wanting where the husband's absence is due to imprisonment,⁵⁷ or to sickness,⁵⁸ or where the facts raise a presumption of death.⁵⁹ This intent is the decisive characteristic, and the question of intent is always a question of fact, and must be proved either by direct evidence, or as the necessary and certain consequence of other facts clearly established. Mere separation may result from necessity or accident, or be caused by absence on business, and be

⁵² *Ex parte Aldridge*, 1 Swab. & T. 88; see *Danforth v. Danforth*, 88 Me. 120.

⁵³ *Rie v. Rie*, 34 Ark. 37.

⁵⁴ *Holmes v. Holmes*, 44 Mich. 555.

⁵⁵ *Whippen v. Whippen*, 147 Mass. 294.

⁵⁶ *Peirce v. Peirce*, 160 Mass. 216.

⁵⁷ *Townsend v. Townsend*, L. R. 3 P. & D. 129.

⁵⁸ *Keech v. Keech*, L. R. 1 P. & D. 641.

⁵⁹ *Bodwell v. Bodwell*, 113 Mass. 314.

much against the will of both parties. No absence can amount to a desertion without an *animus non revertendi*.⁶⁰

It is immaterial that the intention to abandon did not exist at the time of the separation, if it was afterwards formed and acted upon. The intention not to return, formed after separation has taken place, accompanied by continuation of the separation, is desertion; but the desertion in such a case begins when the intention is formed.⁶¹ The intent to desert need not be proved by direct evidence, but, like intent in other cases in which it is material, may be inferred from the attendant facts and circumstances. It may be presumed from long abandonment without apparent cause.⁶² An intent, when once shown to have existed, will be presumed to have continued, until the contrary appears.⁶³

An insane person cannot commit an original desertion, for the obvious reason that the intent to desert is wanting. But there is authority for saying that if a married party, while sane, deserts the other, and then becomes insane, the desertion will continue notwithstanding the insanity. This precise question has not been adjudicated in this commonwealth, but it was in substance so held by the majority of a divided court in construing a statute similar to ours.⁶⁴ If, however, a wife is deserted when sane, and soon becomes insane, the husband's original intent to desert will continue notwithstanding his wife's insanity, and a libel for desertion in her behalf may be maintained by her guardian although the mental condition of the libellant is such that she has no rational or settled wishes or opinions.⁶⁵

64. Consent of the Abandoned Spouse.

There must be not only a cessation of cohabitation for the statutory

⁶⁰ *Hall v. Hall*, 4 Allen, 40; *Williams v. Williams*, 3 Swab. & T. 547; *Ex parte Aldridge*, 1 Swab. & T. 88; see *Hanson v. So. Scituate*, 115 Mass. 336; *Bennett v. Bennett*, 43 Conn. 313.

⁶¹ *Gatehouse v. Gatehouse*, 1 Prob. & Div. 331; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. Ch. 47; *Reed v. Reed*, Wright, 224; *Davis v. Davis*, 37 N. H. 191; *Conger v. Conger*, 13 N. J. Eq. 286.

⁶² 1 Greenl. on Ev. sec. 53 and cited cases; *Lawrence v. Lawrence*, 2 Swab. & T. 575.

⁶³ *Hall v. Hall*, 4 Allen, 40.

⁶⁴ *Douglass v. Douglass*, 31 Iowa, 421.

⁶⁵ *Cowan v. Cowan*, 139 Mass. 377.

period, and an intent to abandon, to constitute desertion, but the abandonment must be without the consent of the party abandoned. Nothing is better settled than that abandonment or separation by mutual consent — whether such consent is expressed in the form of an agreement or deed of separation, or is inferred from the conduct of the parties and the circumstances — cannot be relied upon as ground for divorce. A desertion consented to is not a desertion.⁶⁶

Desertion can only be complained of when it is against the will of the party who is deserted. If there be a separation by consent, that consent shows that the parties deem it no grievance to be deprived of each other's society, and nothing but an unconditional and entire resumption of their early relations can restore them to such a position as would make a new separation a desertion within the purview of the statute.⁶⁷

The consent of the abandoned party, like consent in other cases, need not be proved by direct evidence, but may be inferred from the conduct of either or both of the parties. The consent must in some way be manifested. "The undisclosed emotions of the deserted party do not affect his rights."⁶⁸ The fact of consent, however, may be shown by his conduct.⁶⁹ Consent to the separation may be inferred from a course of conduct inducing it, or from a course of conduct promoting the continuance of a separation which has already taken place.⁷⁰

If, after a wife has separated from her husband, even without justification, she offers to return to him, and he refuses to receive her, her continued absence is not desertion. Such refusal may be inferred from his conduct towards her after the offer to return. Thus, where a wife who was living apart from her husband, each denying desertion, and alleging that the fault was on the part of the other, offered to live with him if he would treat her as a wife, and he saw her but once after the offer, and never asked her to come back, or

⁶⁶ St. 1838, c. 126; Gen. St. c. 107, sec. 7; *Southwick v. Southwick*, 97 Mass. 327; *Sergeant v. Sergeant*, 33 N. J. Eq. 204; *Bennett v. Bennett*, 43 Conn. 313; *Lea v. Lea*, 99 Mass. 495; *Gilmer v. Gilmer*, 37 Mo. App. 672.

⁶⁷ *Ford v. Ford*, 143 Mass. 577; *Lea v. Lea*, 8 Allen, 418; *Townsend v. Townsend*, L. R. 3 Prob. & Div. 129; *Fitzgerald v. Fitzgerald*, Id. 136; *Buckmaster v. Buckmaster*, L. R. 1 Prob. & Div. 713; *Ward v. Ward*, 1 Swab. & T. 185.

⁶⁸ *Ford v. Ford*, 143 Mass. 577.

⁶⁹ *Ford v. Ford*, *supra*.

⁷⁰ *Bradley v. Bradley*, 160 Mass. 258; *Thorpe v. Thorpe*, 9 R. I. 57.

made any effort to have her return and live with him, it was held that she was not guilty of desertion after the offer to resume cohabitation.⁷¹

Even where a wife who has deserted her husband without cause makes no offer to return, his conduct may show that he would not receive her. If he does so act as to show affirmatively that he will not receive her, he consents to the separation, and cannot rely upon its continuance as a ground of divorce. He is not bound to take any active steps to induce her to return, and therefore his mere silence will not amount to consent; but it is otherwise if he shows by an overt act that he is unwilling to receive her. Accordingly, it has been held that if a wife has deserted her husband, and before the statutory period of desertion was complete he brings suit against her for a divorce on the ground of adultery, his conduct in instituting legal proceedings manifests an unwillingness to resume cohabitation, and prevents him from relying on the continuance of the separation pending the suit as such desertion as will entitle him to a divorce on that ground. The filing of the original libel is an act expressly directed against the wife, and it is impossible to say that it did not import on its face a refusal longer to cohabit with her, as its only object would have been defeated by cohabitation.⁷²

There can be no desertion during the pendency of divorce proceedings, it being presumed that a return would not be permitted.⁷³ So, also, the pendency of a suit to annul a marriage will justify the absence of the libellee.⁷⁴

A consent to the separation will be inferred where the parties have entered into articles of separation.⁷⁵ But the effect of a deed of separation may be changed by subsequent conduct of the parties showing an intent to desert.⁷⁶

⁷¹ *Bradley v. Bradley*, *supra*.

⁷² *Ford v. Ford*, *supra*; *Marsh v. Marsh*, 14 N. J. Eq. 315; *Palmer v. Palmer*, 36 Fla. 385; *Doyle v. Doyle*, 26 Mo. 545; *Chipehase v. Chipehase*, 48 N. J. Eq. 549; *Porritt v. Porritt*, 18 Mich. 420; *Chapman v. Chapman*, 10 C. E. Green, 394; *Salorgne v. Salorgne*, 6 Mo. App. 603.

⁷³ *Haltenhof v. Haltenhof*, 44 Ill. App. 135.

⁷⁴ *Sullivan v. Sullivan*, 2 Add. Eecl. 299; *Clowes v. Clowes*, 9 Jur. 356.

⁷⁵ *Cock v. Cock*, 3 Sw. & Tr. 514; *Crabb v. Crabb*, L. R. 1 P. & D. 601; *Anquez v. Anquez*, L. R. 1 P. & D. 176; *Parkinson v. Parkinson*, L. R. 2 P. & D. 25; *Nott v. Nott*, L. R. 1 P. & D. 251.

⁷⁶ *Beauclerk v. Beauclerk*, (1895) Prob. 220.

There is nothing in the history of legislation which intimates that the legislature intended to give authority to dissolve the bond of matrimony in all cases where a husband or wife had separated from the other with his or her consent. In St. 1838, ch. 126, sec. 1, it was expressly provided that the desertion should be "without the consent of the party deserted." This clause was omitted in St. 1857, ch. 228, sec. 2, for two obvious reasons. In the first place, it was superfluous; the word "desertion" of itself implying that the separation was not with the assent or permission of the party deserted, but the contrary. In the next place, by St. 1857, ch. 228, sec. 2, the legislature intended to provide that in two special cases the party deserting might maintain a libel for divorce from the bond of matrimony; that is, where a party had left the abode of the other on account of his or her extreme cruelty, or the desertion of the wife was caused by the gross or wanton and cruel neglect of the husband to provide suitable maintenance for her, it was enacted that the bond of matrimony might be dissolved on the libel of the party deserting, after the separation had continued for five consecutive years.

This interpretation of the statute not only gives full force and effect to each and every part of the enactment, but it is consistent with the policy of the law, as it has always been understood and administered in this commonwealth, by which the marriage is held to be indissoluble, unless it can be shown that there has been a breach of duty and violation of the contract by the party against whom a divorce is sought to be obtained. There is no such breach or wrongful act where a husband or wife leaves the other with his or her full and voluntary assent. It would require explicit language to convince the court that the legislature intended to reverse this well-settled and salutary policy. Certainly it would be slow to arrive at a conclusion by implication from doubtful or equivocal language, that a separation by consent of both parties, however long continued, would of itself furnish sufficient ground for a dissolution of the bond of matrimony. Such a provision of law would fall but little short of giving a direct sanction to a mode of obtaining a divorce by collusion between the parties.⁷⁷

Where a marriage is performed under an agreement that the par-

⁷⁷ Southwick v. Southwick, 97 Mass. 327; Lea v. Lea, 8 Allen, 418; Lea v. Lea, 99 Mass. 493; Mansfield v. Mansfield, Wright, 284; Ward v. Ward, 1 Swab. & T. 185.

ties will not cohabit, and the purpose of the marriage is to avoid a prosecution for bastardy and legitimize the offspring, a divorce may be granted for adultery although the marriage was not consummated by coition. They may live apart by mutual consent, and neither can obtain a divorce on the ground of desertion, as such a separation is not desertion within the meaning of the statute; but living apart by agreement confers no license to be unfaithful to one's marriage obligations, and is no bar to a suit for divorce brought by either against the other on the ground of adultery.⁷⁸

65. Misconduct of the Abandoned Spouse.

The abandonment, to constitute desertion, even where there is no actual consent, must be unjustifiable. If either spouse is guilty of such misconduct as to justify the other in leaving, the latter's absence does not amount to desertion. Ill treatment or misconduct of the husband of such a degree or under such circumstances as not to amount to cruelty, for which the wife would be entitled to sue for a divorce against him, might yet justify her in leaving his house, and prevent his obtaining a divorce for her desertion, if she did so.⁷⁹

The case of *Lyster v. Lyster*, *supra*, was a libel for divorce on the ground of desertion. The libellee justified by pleading cruel and abusive treatment on the part of the libellant and his gross and confirmed habits of intoxication. The court held, in substance, that the cruelty and intoxication might be of such a nature as to justify her in leaving him, while it might be insufficient to warrant the court in granting her a divorce for the same misconduct; that it was not a case of recrimination, and that the general rule that recrimination must allege a cause which the law declares to be sufficient for a divorce is not affected by it. This decision has been affirmed in several late cases.⁸⁰ The justice of this decision is conceded by an eminent author, who has criticised the ruling as mere dictum. He contends that this ruling is true only to the extent that such conduct is evidence of consent, and bars a divorce for desertion on that ground, and that no cause should be deemed sufficient to justify withdrawal

⁷⁸ *Franklin v. Franklin*, 154 Mass. 515; *McQuaid v. McQuaid*, Wright, 223.

⁷⁹ *Lyster v. Lyster*, 111 Mass. 327; *Pidge v. Pidge*, 3 Met. 257-261; *Burlen v. Shannon*, 3 Gray, 391; *Bailey v. Bailey*, 97 Mass. 379; *Walworth, C.*, in *People v. Mercein*, 8 Paige, 68; *Laing v. Laing*, 6 C. E. Green, 248.

⁸⁰ *Morrison v. Morrison*, 142 Mass. 361; *Watts v. Watts*, 160 Mass. 464.

from cohabitation which is not enough to call for a judicial separation.⁸¹ As justifiable cause for living apart need not necessarily be sufficient for an absolute divorce in the wife's favor, she will have the right under such circumstances to pledge his credit for necessities.⁸²

A party guilty of desertion for the full statutory period cannot enforce any marital right against the other, but it is otherwise if the offense was committed before the three years had expired, because until then a locus penitentie remained to the guilty party, who was at liberty to return and regain his former rights. Accordingly, a husband cannot maintain a libel for divorce from the bond of matrimony for his wife's desertion and adultery if it appears that during the five years of her desertion he himself committed adultery.⁸³ Neither can a husband set up the wife's desertion in bar of her libel for his adultery committed before her desertion had continued so long as to give him a right to a divorce for that cause.⁸⁴ But it has been held that where a wife has deserted a husband for a period of five years, so that he would be entitled to a divorce against her on that ground, she cannot maintain a libel against him on the ground of his adultery after the lapse of five years, but she may maintain it if he has committed adultery within the five years, and before her offense is complete.⁸⁵ This doctrine stands on the obviously just ground stated in *Hope v. Hope*,⁸⁶ where it is said that "a party guilty of a breach of the marriage vow should not have the assistance of the court to enforce any marital right."

66. Evidence.

The libellant must prove that the desertion occurred without just cause, that the libellee intended to desert, and that the separation is against the will of the libellant. Mere absence for the statutory period is insufficient. The conduct of the parties both before and after the desertion occurred, together with the attendant circum-

⁸¹ 1 Bish. Mar., Div. & Sep. sec. 1748 et seq.

⁸² *Watts v. Watts*, 160 Mass. 464; *Reynolds v. Sweetser*, 15 Gray, 78; *Bazely v. Forder*, L. R. 3 Q. B. 559; 2 Kent's Com. (14th ed.) 125, note x.

⁸³ *Clapp v. Clapp*, 97 Mass. 531.

⁸⁴ *Walker v. Walker*, 172 Mass. 82.

⁸⁵ *Hall v. Hall*, 4 Allen, 39.

⁸⁶ 1 Swab. & T. 107.

stances, is admissible, and is very material to enable the court to determine the cause for the separation and the intent of the libellee. The declarations of the parties at the time of the desertion are admissible, as part of the *res gestæ*, to show the intent.

The fact of desertion by a husband may be proved by a great variety of circumstances; as, for instance, leaving his wife with a declared intention never to return; marrying another woman or otherwise living in adultery, abroad; absence for a long time, not being necessarily detained by his occupation or business or otherwise; making no provision for his wife, or wife and family, being of ability to do so; providing no dwelling or home for her, or prohibiting her from following him; and many other circumstances tending to prove the absolute desertion.⁸⁷

67. Pleading.

Desertion or abandonment is usually alleged in the terms of the statute. The libel should state when the desertion occurred, and that it was continuous and uninterrupted for the statutory period. As the statute permits divorce only when the desertion continues to the time of filing the libel, there should be an allegation to that effect. The libellant, after alleging the jurisdictional facts, the marriage, and the desertion, need not plead more than is necessary to make a *prima facie* case. It is not necessary to allege that the innocent party is or has been willing to receive and cohabit with the deserter.⁸⁸

⁸⁷ *Gregory v. Pierce*, 4 Met. 478.

⁸⁸ See Appendix, Form No. 40 and note.

CHAPTER VI.

GROSS AND CONFIRMED HABITS OF INTOXICATION AS A CAUSE OF DIVORCE.

SECTION.

68. Intoxication in General.

69. Intoxication Produced by Liquors.

70. Intoxication Produced by Drugs.

71. Evidence.

72. Pleading.

68. Gross and Confirmed Habits of Intoxication. In General.

A person given to the excessive use of intoxicating drink, who has lost the power or will, by frequent indulgence, to control his appetite for it is an habitual drunkard within the meaning of the law relating to divorce. As the language of the statute clearly implies, it is the habit of getting drunk, hence there must be both drunkenness and a habit. A person will not be regarded as a confirmed drunkard, or as having contracted gross and confirmed habits of intoxication, unless it appears that it has become a fixed habit with him. No single act of drunkenness however gross will sustain the action.

The original statute authorizing a divorce for this cause contained the proviso that the gross and confirmed habits of intoxication must have been "contracted after marriage."¹ But it was subsequently amended so as to impose no condition as to when the habit was contracted.² The phrase, "gross and confirmed habits of intoxication," means the custom or habit of getting drunk; the constant indulgence in such stimulants as wine, brandy, and whiskey, whereby intoxication is produced; not the ordinary use, but the habitual use of them. The habit should be actual or confirmed. It may be intermittent. It need not be continuous or even of daily occurrence.

Occasional acts of intoxication are not sufficient to make one an habitual drunkard. There must be the involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit, acquired from frequent and excessive indulgence. The man is reduced to that pitiable condition in which

¹ St. 1870, c. 404, sec. 2; *Lyster v. Lyster*, 111 Mass. 327.

² St. 1873, c. 371, sec. 6; R. L. ch. 152, sec. 1.

he either makes no vigorous effort to resist and overcome the habit, or his will has become so enfeebled by indulgence that resistance is impossible. He is an habitual drunkard because he is commonly or frequently in the habit of using intoxicating liquors to excess. The offense must be a habit, and frequent recurrence proves it.³

The reason why the law makes habitual drunkenness a ground for divorce is not alone because it disqualifies the husband or wife from attending to business, but in part, if not mainly, because it renders the person addicted thereto unfit for the duties of the marital relation. A man may be an habitual drunkard and yet be able to attend to business during business hours.

Evidence that the libellee, for a period of twelve or fifteen years, had, as often as three or four times a year, yielded to an impulse to drink to excess; that on such occasions he became grossly intoxicated, continuing in that condition a week or ten days together; and that at such times he went or was sent to an asylum for inebriates; that when the desire for drink came upon him he could not resist, and that a single glass would bring on excessive drinking and a renewal of gross intoxication; that there had been no apparent improvement in his habits in this respect; and that any undue excitement made him drink, is sufficient to justify a finding that he had contracted such gross and confirmed habits of intoxication as entitled his wife to a divorce.⁴

69. Intoxication Produced by Liquors.

The word intoxication is used in the statute in its ordinary sense, as referring to the effect of intoxicating liquors, and does not include the use of morphine or other drugs, though the effect of their use is similar. Habitual intoxication from the use of chloroform will not sustain a complaint charging a person with being a common drunkard.⁵ The immoderate and habitual use of morphine by hypodermic injections is not drunkenness within a statute declaring habitual drunkenness a ground of divorce.⁶ A divorce, however,

³ *Com. v. Whitney*, 5 Gray, 85; *Com. v. Whitney*, 11 Cush. 479; *Blaney v. Blaney*, 126 Mass. 205.

⁴ *Blaney v. Blaney*, 126 Mass. 205.

⁵ *Commonwealth v. Whitney*, 11 Cush. 477; *Barber v. Barber*, 14 Law Rep. 375; *Dawson v. Dawson*, 23 Mo. App. 169.

⁶ *Youngs v. Youngs*, 130 Ill. 230, 6 L. R. A. 548.

may now be granted under another statute for gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs.⁷ It must be shown by competent evidence that the gross and confirmed habits of intoxication which make a ground of divorce exist when the libel is filed, and if they no longer exist a divorce cannot be granted, although it is proved that such habits have existed during the coverture.⁸

Where it appeared that the libellee contracted gross and confirmed habits of intoxication after marriage; that he had not reformed during the year after the libellant separated from him, and that his habits continued during that year, at the end of which he went to parts unknown; that this was some five years before the hearing, and he had not been heard from since that time, save that about three years before the hearing it was rumored that he was somewhere in the West, but nothing definite was known about him, the presiding justice is at liberty, as matter of law, to draw the inference that the libellee's habits continued, if upon all the evidence he thinks that inference reasonable and proper.⁹

70. Gross and Confirmed Drunkenness Caused by the Use of Drugs.

A divorce from the bond of matrimony may be decreed for gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs.¹⁰ This act was probably passed to supplement the provision in the Pub. Sts., ch. 146, sec. 1, where, among other causes of divorce, is mentioned "gross and confirmed habits of intoxication." Habitual intoxication from the use of chloroform will not sustain a complaint under the Rev. Sts., ch. 143, sec. 5, charging a person with being a common drunkard, but is limited to alcoholic drunkenness, and does not include the excessive use of opiates.¹¹ The immoderate and habitual use of morphine by hypo-

⁷ St. 1889, c. 447; R. L. ch. 152, sec. 1.

⁸ *Blaney v. Blaney*, 126 Mass. 205; *Burt v. Burt*, 168 Mass. 204; *McCraw v. McCraw*, 171 Mass. 146; *Gourlay v. Gourlay*, 16 R. 1. 705.

⁹ *McCraw v. McCraw*, 171 Mass. 146.

¹⁰ St. 1889, c. 447; R. L. ch. 152, sec. 1; Appendix, Form No. 39, and note.

¹¹ *Commonwealth v. Whitney*, 11 Cush. 477; *Barber v. Barber*, 14 Law Rep. 375; *Dawson v. Dawson*, 23 Mo. App. 169.

dermic injections is not drunkenness within a statute declaring habitual drunkenness a ground of divorce.¹²

The statute of 1889 is broad enough to include drunkenness caused by the use of any drug. This statute has as yet been construed by only one reported decision. It was held in that case that "gross and confirmed drunkenness" is a condition; that substantially the same rules apply to it as to what is called in the Pub. Sts., ch. 146, sec. 1, "gross and confirmed habits of intoxication:" that the statute does not authorize a divorce on account of the use of a drug, but only for its abuse; that the use must be excessive, and must produce a certain result, and that this result must exist when the libel is filed. A ruling of the judge at nisi prius, that the libellant would be entitled to a decree if, at any time after the statute was in force, the libellee was in the condition set forth in the statute, although the gross character of the use of the drug had become modified, or had ceased when the libel was brought, is erroneous.¹³

Witnesses, some medical and others not, but who had been with the libellee for a long period of time, and were familiar with her habits as to the use of morphine and its effects upon her, may state that, in their opinion, at various times when they saw her she was under the influence of morphine. In this case the witnesses were not asked whether the libellee was a gross and confirmed drunkard, owing to the use of opium or other drugs, but whether, at certain times, she was under the influence of morphine.¹⁴

71. Evidence.

Habitual Drunkenness.

What amounts to gross and confirmed habits of intoxication is a question of law. The testimony of experts is excluded, as no witness will be allowed to testify in general terms that the libellee has contracted gross and confirmed habits of intoxication, but must state particular facts and circumstances, leaving the court to judge of their sufficiency.¹⁵

¹² *Youngs v. Youngs*, 130 Ill. 230, 6 L. R. A. 548.

¹³ *Burt v. Burt*, 168 Mass. 204; see also *Hillis v. Hillis*, 6 Law Reporter, 174; *McCraw v. McCraw*, 171 Mass. 146; *Gourlay v. Gourlay*, 16 R. I. 705.

¹⁴ *Burt v. Burt*, *supra*; *Lawson's Expert Ev.* 473.

¹⁵ *Batchelder v. Batchelder*, 14 N. H. 380; *Golding v. Golding*, 6 Mo. App. 602.

The fact that certain persons never saw a man drunk is negative testimony, and does not disprove affirmative evidence of those who testify to having seen him in such condition. It must be shown that he was frequently and customarily or habitually given to the excessive use of intoxicating drink, and had lost the power or the will by frequent indulgence to control his appetite for it.

The Fact of Drunkenness.

But whether a person is drunk is a question which a person not an expert is competent to answer, as it is something which may fairly be considered to be a matter of common knowledge and observation.¹⁶

Whether a person is drunk or sober are facts patent to the observation of all, and their comprehension requires no scientific knowledge. Intoxication or drunkenness are facts which may be proved as other facts are proved. A witness by observation can learn and know facts, and such facts he may state. He would not be confined to a detail of the combination of minute appearances that have enabled him to ascertain the fact of intoxication. The details of conduct, attitude, gesture, words, tones and expression of eye and face may be stated by him, or he may state the fact of intoxication — a fact which he can ascertain by personal observation, as he ascertains other facts. So, also, a witness may state whether or not a person had the appearance of being intoxicated, and such statement of appearance would be the statement of a fact. Facts which are latent in themselves, and only discernible by way of appearances more or less symptomatic of the existence of the main fact, may, from their very nature, be shown by the opinions of witnesses as to the existence of such appearances or symptoms. Intoxication, sanity, the state of health or of the affections, are facts of this character.

It is not a matter of opinion, any more than questions of distance, size, color, weight, identity, age, and many other similar matters.¹⁷

72. Pleading.

It is sufficient to allege in general terms, in the language of the

¹⁶ *Burt v. Burt*, 168 Mass. 206; *People v. Eastwood*, 4 Kernan, 562; *State v. Huxford*, 47 Iowa, 16.

¹⁷ *Com. v. Sturtivant*, 117 Mass. 122, 133; *Com. v. O'Brien*, 134 Mass. 198; *Edwards v. Worcester*, 172 Mass. 104; *Stacy v. Portland Publishing Co.*, 68 Me. 279; *People v. Eastwood*, 14 N. Y. 562.

statute, that the libellee has contracted gross and confirmed habits of intoxication. The specific times and places when and where the libellee was intoxicated need not be stated. Particularization is unnecessary, as drunkenness is a habit manifesting itself by repeated and continuous acts.¹⁸

¹⁸ See Appendix, Form No. 38, and note.

CHAPTER VII.

CRUEL AND ABUSIVE TREATMENT AS CAUSE OF DIVORCE.

SECTION.

73. Cruel and Abusive Treatment Defined.
74. Cruel and Abusive Treatment and Extreme Cruelty Distinguished.
75. "Extreme Cruelty" Omitted from Revised Laws.
76. Cruel and Abusive Treatment in Detail.
77. Husband Has no Right to Chastise His Wife.
78. Husband Has no Right to Restrain His Wife of Liberty.
79. Masturbation not Cruelty.
80. Denial of Sexual Intercourse not Cruelty.
81. Cruelty to the Husband.
82. Condonation.
83. Recrimination.
84. Insanity as Defense.
85. Estoppel Arising from a Libel Having Been Dismissed.
86. Evidence — Declarations and Marks — Res Gestæ.
Physical Condition.
87. Record of Conviction.
88. Pleading.

73. Cruel and Abusive Treatment Defined.

Extreme cruelty or cruel and abusive treatment as used in the divorce statutes means actual personal violence intentionally inflicted, or such a course of treatment as endangers life, limb or health, or creates a reasonable apprehension of such danger and renders cohabitation unsafe.

Cruelty, as defined by the ecclesiastical courts, was any conduct of one of the parties which created a reasonable apprehension of bodily harm to the other if cohabitation was continued; everything being *sævitia*, which tended to bodily harm, and in that manner rendered cohabitation unsafe.¹

Legal cruelty has also been defined to be such conduct as shall cause injury to life, limb, or health, or create a danger of such injury, or a reasonable apprehension of such danger.² What misconduct will create an apprehension of personal harm is, of course, a question of

¹ *Holden v. Holden*, 1 Hagg. Eccl. 458; 2 Kent's Com. 126.

² *Bailey v. Bailey*, 97 Mass. 373; *Peabody v. Peabody*, 104 Mass. 195; *Ford v. Ford*, 104 Mass. 198; *Cowles v. Cowles*, 112 Mass. 298; *Evans v. Evans*, 1 Hagg. Con. 35; *Lockwood v. Lockwood*, 2 Curt. Eccl. 281.

fact, and no rule can be laid down.³ There must be personal violence or manifest danger of it; for unkindness, reproachful language on the one side, or vain and unfounded fear on the other, do not constitute legal cruelty.⁴ Ill treatment, to constitute cruelty, must be willful, and not inflicted accidentally or unintentionally.⁵

The term, extreme cruelty, as used in the statute, has been held in this commonwealth to import more than neglect of duty or gross misconduct; it means, in general, personal violence, or such acts and conduct as show actual suffering or great personal danger.⁶

74. Cruel and Abusive Treatment and Extreme Cruelty Distinguished.

The distinction between "extreme cruelty" and "cruel and abusive treatment," if there is any, except as it may appear from the evidence in each particular case, is not distinctly drawn in the reported decisions. The definition of extreme cruelty seems to be unsettled. It is held in some cases that extreme cruelty is personal violence intentionally inflicted.⁷ These two causes for divorce have been construed as being equivalent, and to require at least proof of such cruelty as shall cause injury to life, limb, or health, or create a danger of such injury, or a reasonable apprehension of such danger upon the parties continuing to live together, and is broad enough to include mere words, if they create a reasonable apprehension of personal violence, or exasperating language which is so habitual or frequent as to cause injury to health.⁸ But a later decision has decided that these two causes for divorce were held to admit of different degrees of proof; that cruelty denoted personal violence, but cruel and abusive treatment included any acts or conduct which injured or endangered life, limb, or health, or created reasonable apprehension of such injury or danger from a continuance of the cohabitation. This distinction was not made in the well-considered

³ Robinson v. Robinson, 66 N. H. 600, 15 L. R. A. 121.

⁴ Barlee v. Barlee, 1 Add. Eccl. 301; Neeld v. Neeld, 4 Hag. Eccl. 263.

⁵ Ford v. Ford, 104 Mass. 198; W. v. W., 141 Mass. 495, 55 Am. Rep. 491; Neeld v. Neeld, 4 Hagg. Eccl. 263.

⁶ Burlen v. Shannon, 3 Gray, 390.

⁷ Hill v. Hill, 2 Mass. 150; Warren v. Warren, 3 Mass. 321; Ford v. Ford, 104 Mass. 199; Lyster v. Lyster, 111 Mass. 327.

⁸ Bailey v. Bailey, 97 Mass. 373; Freeborn v. Freeborn, 168 Mass. 52; Holyoke v. Holyoke, 78 Me. 404; Kelley v. Kelley, L. R. 2 P. & D. 59.

case of *Bailey v. Bailey*, supra, in which the cause alleged was extreme cruelty.⁹

75. "Extreme Cruelty" Omitted from Revised Laws.

The term "extreme cruelty" has been omitted from the Revised Laws, and the following reasons have been given therefor:

" 'Extreme cruelty,' as a distinct ground of divorce, has been omitted because it does not include any cause which is not covered by the words cruel and abusive treatment, and the incorporation of both expressions in one section is misleading. In Rev. Sts., ch. 76, sec. 6, which provides for a divorce from bed and board, the words 'extreme cruelty' were used, and the section was reported by the commissioners who compiled the General Statutes in that form. The words 'cruel and abusive treatment,' as they appear in Gen. Sts., ch. 107, sec. 9, were inserted by the legislature with the evident purpose of enlarging the sphere of operation of the statute, and the words 'extreme cruelty' were probably left in from abundant caution. While those words have been construed to be limited to cases in which injury is caused to life or health, or in which danger of such injury or reasonable apprehension thereof is shown, even this construction is broader than that originally given to the words 'extreme cruelty,' and covers all that is included in the later construction of that term."¹⁰

76. Cruel and Abusive Treatment in Detail.

Extreme cruelty was originally a cause of divorce from bed and board only.¹¹ Extreme cruelty, within the meaning of the statute of 1785, ch. 69, means personal violence, and answers to the *sævitia* of the civil law, and it was not extreme cruelty under that statute if the husband deserted the libellant, and was absent several years, in consequence of which she and her children suffered great privations and distress.¹² So, also, when the libellant proved some instances of

⁹ *Lyster v. Lyster*, 111 Mass. 327; *Holyoke v. Holyoke*, 78 Me. 404, 6 Atl. 827.

¹⁰ Report of Commissioners for Consolidating the Pub. Sts., note to R. L. ch. 152, sec. 1; citing, *Bailey v. Bailey*, 97 Mass. 373; *Holt v. Holt*, 117 Mass. 204; *Holyoke v. Holyoke*, 78 Me. 404.

¹¹ St. 1785, c. 69, sec. 3; St. 1810, ch. 119; R. S. ch. 76, sec. 6; Gen. St. ch. 107, sec. 9; *Hill v. Hill*, 2 Mass. 150; *Perkins v. Perkins*, 6 Mass. 69.

¹² *Warren v. Warren*, 3 Mass. 321.

personal violence which appeared to have been wholly unprovoked by her, the court, in granting the divorce, said: "When force and violence are once used the woman is unsafe. Such a man ought not to have power over his wife."¹³

It was held, moreover, that threats of violence without an actual assault were not a legal cause of divorce under that statute, and that the wife's remedy in such a case was by exhibiting articles of the peace against her husband.¹⁴ It has also been said that the court is not to wait till the threats are carried into execution, but is to interpose where the words are such as might raise a reasonable apprehension of violence, and excite such fear and terror as make the life of the wife intolerable.¹⁵ Words of menace, importing actual danger of bodily harm, will justify the interposition of the court, as the law ought not to wait till the mischief is actually done.¹⁶

One act of personal violence is sufficient if it appears that the libellee has little control over his passions, and is liable to repeat the act on any future provocation.¹⁷ Mere threats not intended to be carried out, and not furnishing reasonable grounds for apprehension of bodily injury, are insufficient. What must be the extent of the violence offered, or what will reasonably excite apprehension, will depend upon the circumstances of each case. The station in life and situation of the parties and all the attendant circumstances will be taken into account. A blow between parties in the lower conditions and in the highest stations of life has a very different aspect.¹⁸ The abusive and unkind treatment must result in or threaten bodily harm. Mere mental suffering, caused by unkind, abusive, or insulting words or conduct, is not enough.¹⁹

Lord Stowell said in a leading case: "What merely wounds the

¹³ French v. French, 4 Mass. 587.

¹⁴ Hill v. Hill, 2 Mass. 150.

¹⁵ D'Aguilar v. D'Aguilar, 1 Hag. Eccl. 775.

¹⁶ Oliver v. Oliver, 1 Hag. R. 364; Mytton v. Mytton, 11 Prob. Div. 141; Bailey v. Bailey, 97 Mass. 373; Evans v. Evans, 1 Hag. Const. 35.

¹⁷ French v. French, 4 Mass. 587; Holden v. Holden, 1 Hag. Con. 453; Lockwood v. Lockwood, 2 Curt. Eccl. 281; Reeves v. Reeves, 3 Swab. & T. 139.

¹⁸ Evans v. Evans, 1 Hagg. Const. 35; Westmeath v. Westmeath, 2 Hagg. Ecc. Supp. 1, p. 72; Barrere v. Barrere, 4 Johns. Ch. 187; Shelford on Divorce, p. 423.

¹⁹ Atkins v. Atkins, (Suffolk) 1849, reported in 1 Bishop on Mar., Div. and Sep. sec. 1555, note; Harris v. Harris, 2 Phillim. 111, 1 Eng. Ecc. R. 204; Barlee v. Barlee, 1 Addams. Ecc. 301; Kirkman v. Kirkman, 1 Hagg. Const. 409.

mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offenses in the marriage state, undoubtedly, not innocent, surely, in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, — for it may exist on one side as well as on the other, — the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. And if it be complained that, by this inactivity of the courts, much injustice may be suffered, and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further. They cannot make men virtuous; and as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove. These are the negative descriptions of cruelty. They show only what is not cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the court. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation.”²⁰

It is obvious from these authorities that there may be personal violence which does not amount to what is regarded as cruelty; and that there may be cruelty without personal violence. And in every case the character and condition of the parties is to be taken into consideration; and the practical judgment of the court must be exercised in each particular case.²¹

Questions of Law and Fact.

What conduct constitutes cruelty as a cause of divorce is a question

²⁰ *Evans v. Evans*, 1 Hag. Con. 35, 4 Eng. Eccl. 310; *Lockwood v. Lockwood*, 2 Curt. Eccl. 281.

²¹ *Bailey v. Bailey*, 97 Mass. 373; *Otway v. Otway*, 2 Phillim. 95.

of law for the court, but whether the evidence discloses such conduct is a question of fact to be decided at the trial.²²

77. A Husband Has no Right to Chastise His Wife in Any Case.

According to Blackstone and some of the early decisions, the husband formerly had the right to give his wife moderate correction, but no such right is now recognized.²³ It is doubtful whether the right to punish a wife ever existed at common law, there being no adjudications to that effect, and nothing but ancient dicta. Chastisement is now unlawful in any case, and will render the husband guilty of assault and battery.²⁴ Moreover, if sufficiently severe, or often repeated, it may entitle the wife to a divorce on the ground of cruelty. As was said by Chancellor Walworth, "Whatever may be the common law on the subject, the usual sense of this community, in our present state of civilization, will not permit the husband to inflict personal chastisement on his wife, even for the grossest outrage."²⁵

78. A Husband Has no Right to Restrain a Wife of Her Liberty.

If a wife refuses to live with her husband he is not entitled to keep her in confinement in order to enforce restitution of conjugal rights. A husband cannot now restrain a wife of her liberty who refuses to live with him.²⁶ The court sitting in any county may, upon the petition of the wife, prohibit the husband from imposing any restraint upon her personal liberty during the pendency of the libel.²⁷

79. Masturbation Not Cruelty.

The practice of masturbation by a husband in the presence of his wife, but without compelling her to remain present, which injures her health by its effect upon her feelings, is not cruel and abusive treatment. The words cruel and abusive treatment seem to import

²² *Janvrin v. Janvrin*, 58 N. H. 144.

²³ 1 Bl. Comm. 445.

²⁴ *Com. v. McAfee*, 108 Mass. 458, 11 Am. Rep. 383; *Pearman v. Pearman*, 1 Sw. & Tr. 601; *Reg. v. Jackson*, 1 Q. B. Div. 671 (1891); *Perry v. Perry*, 2 Paige, 501; *Abbott v. Abbott*, 67 Me. 304; *Poor v. Poor*, 8 N. H. 307; *Schouler Dom. Rel. sec. 44*.

²⁵ *Perry v. Perry*, 2 Paige, 501.

²⁶ *Reg. v. Jackson*, (1891) 1 Q. B. 671.

²⁷ R. L. ch. 152, sec. 15; Appendix, Form No. 25.

on their face conduct directed towards the other party, and with a malevolent motive. Purely self-regarding conduct, not forced upon even the knowledge of the wife otherwise than by the usual intimacy of matrimony, does not constitute the offense merely because its folly, its disgusting character, or its wickedness, disturbs her nerves or conscience, and thus affects her health.²⁸

80. Denial of Intercourse.

The utter denial of sexual intercourse on the part of the wife is not cruel and abusive treatment entitling the husband to a divorce, neither is it a cause for annulling the marriage. The refusal of either party to occupy the same bed is not cruelty.²⁹ There are dicta elsewhere that such refusal may be cruelty under certain circumstances. "Whether from long continuance without cause, in extreme cases, it may not become cruel and abusive treatment, is a question of fact, to be determined in each particular case upon its own particular facts and circumstances."³⁰ But injury to health caused by declining to have sexual intercourse has never been established in any reported decision.

31. Cruelty to the Husband.

The complaint generally proceeds from the wife as the weaker person; but it may, according to the ecclesiastical law, come from the man, as has occurred in several cases.³¹ No distinction between the parties is made by our divorce statutes, but in view of the relative strength of the husband and his ability to protect himself, it must be a clear case that will induce the court to grant a divorce to the husband for cruelty. He must prove such a course of treatment on the part of the wife as to make it unsafe for him to live with her.³²

If it appears that the libellee failed to stay at home and take care

²⁸ *W. v. W.*, 141 Mass. 495, 55 Am. Rep. 491.

²⁹ *Cowles v. Cowles*, 112 Mass. 298; *Cousen v. Cousen*, 4 Sw. & Tr. 164; *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. 775; *Steele v. Steele*, 1 MacArthur, 505; *Reid v. Reid*, 21 N. J. Eq. 331; *Schoessow v. Schoessow*, 83 Wis. 553; *Magill v. Magill*, 3 Pittsb. R. (Pa.) 25; *Eshbach v. Eshbach*, 23 Pa. St. 343; see instruction in *Gordon v. Gordon*, 48 Pa. St. 226.

³⁰ *Stewart v. Stewart*, 78 Me. 548; 57 Am. Rep. 822.

³¹ Sir John Nichols in *Waring v. Waring*, 2 Phill. 132, 133; *Prichard v. Prichard*, 3 Sw. & Tr. 523; *Kirkman v. Kirkman*, 1 Hagg. Cons. 409.

³² *Palmer v. Palmer*, 1 Paige, 276; *Perry v. Perry*, 1 Barb. Ch. 516.

of her husband or to consent to his hiring a nurse or housekeeper, threatening to leave him if he hired one; that he was not dependent solely upon his wife; that he was under the care of a physician and had the money with which to procure nursing and proper food, which food he did in fact procure when he got up from his sick bed by boarding with the occupants of another tenement in the same house; that he afterwards went away in search of health, and that the libellant's health was temporarily injured by the libellee's failure to comply with the doctor's orders as to the libellant's diet and medicines, such acts do not amount to cruel and abusive treatment, and are insufficient to warrant the granting of a divorce.³³

If it appears that the libellant was to some extent affected injuriously in his health by his wife's acts and words, and she had no purpose to harm him, but was moved in part by a desire for his success in life, and in part by her own nervous condition, she being in reality strongly attached to him and her feelings affectionate, the decision of the justice dismissing the libel will be final. The question being not whether, on the facts stated, a divorce must have been granted, but whether, as matter of law, these facts gave the libellant an absolute right to a divorce.³⁴

82. Condonation.

It was formerly held that condonation did not apply to cruelty, and that a divorce would not be refused solely for the reason that the parties cohabited after the personal violence was inflicted.³⁵ The law as administered in the ecclesiastical courts held that cruelty may be condoned as well as adultery.³⁶ It is now the general rule that cruelty, as well as adultery, may be the subject of condonation, and that cruelty may be condoned by a continuance or a renewal of cohabitation after the misconduct complained of.³⁷

The law is settled in this commonwealth, in accordance with the doctrine declared by Lord Stowell and Sir John Nicholl in the

³³ *Bonney v. Bonney*, 175 Mass. 7.

³⁴ *Freeborn v. Freeborn*, 168 Mass. 50.

³⁵ *Perkins v. Perkins*, 6 Mass. 69; *Hollister v. Hollister*, 6 Barr. 449.

³⁶ *Westmeath v. Westmeath*, 2 Hagg. Eccl. R. Suppl. 114.

³⁷ *Gardner v. Gardner*, 2 Gray, 441 (overruling *Perkins v. Perkins*, 6 Mass. 69); *Robbins v. Robbins*, 100 Mass. 150; *Burr v. Burr*, 10 Paige, 20; *Masten v. Masten*, 15 N. H. 159; *Whispell v. Whispell*, 4 Barb. 217.

English ecclesiastical courts, that any condonation by the wife of her husband's cruelty is on the implied, if not expressed, condition of his treating her in the future with conjugal kindness; that any breach of this condition will revive the right to maintain a libel for the original offense; and that such a breach may be shown by acts, words or conduct which would not of themselves prove sufficient to maintain a libel, may receive a different interpretation and effect upon the question of condonation, after proof that the husband has previously gone to the length of positive acts of cruelty.³⁸

Refusal to speak is some evidence of continued ill will or malice towards the libellant, and creates an apprehension of an outbreak of anger.³⁹ In *Robbins v. Robbins*, supra, the testimony was that for the period of six weeks, beginning only a fortnight after the last act of extreme cruelty proved, the husband, while living in the same house with his wife, wholly and continuously refused to speak to her. Such evidence of persistent and enduring unkindness and ill temper warranted the inference that his smothered anger would break out into acts of cruelty. A divorce was accordingly granted to the wife for the original offense, which, although it had been condoned, was held to have been revived by such conduct of the husband.

83. Recrimination.

It has been said that a divorce on the ground of cruelty will not be granted if the ill treatment has been caused by the misconduct of the libellant. Cruelty, as a foundation for a divorce, must be unmerited and unprovoked. If the conduct be totally incompatible with the duty of a wife, if it be violent and outrageous, if it justly provoke the indignation of the husband, and cause danger to his person, she must reform her own disposition and manner.⁴⁰ Although the libellant may have brought the ill treatment of which she complains upon herself, if it is wholly out of proportion to her offense, intemperate, and

³⁸ *Smith v. Smith*, 167 Mass. 87; *Jefferson v. Jefferson*, 168 Mass. 456; *Robbins v. Robbins*, 100 Mass. 150; *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. 782; *Durant v. Durant*, 1 Hagg. Eccl. 763; *Westmeath v. Westmeath*, 2 Hagg. Eccl. (Supp.) 114.

³⁹ *Robbins v. Robbins*, 100 Mass. 150, 97 Am. Dec. 91; *Dwyer v. Dwyer*, 2 Mo. App. 17; *Pillar v. Pillar*, 22 Wis. 658; *Miller v. Miller*, 72 Tex. 250; *Sharp v. Sharp*, 116 Ill. 509.

⁴⁰ *French v. French*, 4 Mass. 587; *Anthony v. Anthony*, 1 Sw. & Tr. 594; *Waring v. Waring*, 2 Phillim. 132; *Moulton v. Moulton*, 2 Barb. Ch. 309; *Bedell v. Bedell*, 1 Johns. Ch. 604; *Poor v. Poor*, 8 N. H. 307, 29 Am. Dec. 664.

inexcusably severe, her misconduct will not bar her right to relief. When the passions of the husband are shown to be so much beyond his control that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what such violence originated. Such a tendency to bodily mischief renders cohabitation unsafe, and is a peril from which the wife is entitled to protection.⁴¹ Violence committed in a quarrel in which both are in fault, and resulting in equal injury to both is not ground for divorce. As both parties are in *pari delicto*, the court will not interfere.⁴²

84. Insanity.

If cruelty is inflicted by an insane person the remedy is not a divorce, but commitment to an asylum. Such conduct on the part of a person of unsound mind is not willful and intentional, and is not cruelty.⁴³ If the cruelty is committed in lucid intervals, a divorce may be granted.⁴⁴ If cruelty is inflicted after the return from an asylum, it must be proved that the ill treatment occurred during a lucid interval.⁴⁵

85. Estoppel — Libel Dismissed.

A judgment upon a hearing on the merits, dismissing a libel for cruelty is a bar to a subsequent libel founded upon the same acts, even if the second action is supported by proof of additional acts, which antedate the first libel, where such acts were known to the complainant at the time the original suit was brought.⁴⁶

86. Evidence.

It is sufficient to prove the substance of the acts alleged, although there is a slight variance in details. The strictest application of the rule does not require that more than the substance of the issue should be proved; and if the specification was that the libellee beat the libel-

⁴¹ *Evans v. Evans*, 1 Hagg. Const. 35; *Waring v. Waring*, 2 Phillim. 132; *Westmeath v. Westmeath*, 2 Hagg. Ecc. Supp. 1, p. 72.

⁴² *Soper v. Soper*, 29 Mich. 305; *Maben v. Maben*, 72 Iowa, 658.

⁴³ *Hayward v. Hayward*, 1 Sw. & Tr. 81; *Broadstreet v. Broadstreet*, 7 Mass. 474; *Tiffany v. Tiffany*, 84 Iowa, 122.

⁴⁴ *White v. White*, 1 Sw. & Tr. 591; *Curtis v. Curtis*, 1 Sw. & Tr. 192; *Hanbury v. Hanbury*, (1892) Prob. 223.

⁴⁵ *Hall v. Hall*, 3 Sw. & Tr. 347; *Hanbury v. Hanbury*, (1892) Prob. 223.

⁴⁶ *Fera v. Fera*, 98 Mass. 155.

lant severely with a stick, while the evidence showed that it was done with a whip, the variance would be immaterial. So, also, if the charge was that the violence was inflicted in different modes, only one of which was established, it would be enough; for the substance of the charge is that the particular violence offered amounted to cruelty, and the charge is supported by showing any violence of a like kind which could be regarded as cruel within the meaning of the statute.⁴⁷

Wife's Testimony.

The wife, at common law, could not testify against her husband, except in cases of criminal offenses committed against her person, but this enforced silence has been removed by statute, and the parties in divorce proceedings are now competent witnesses.⁴⁸

Declarations and Marks — Res Gestæ.

The declarations of the wife as to the violence of the husband are admissible if they are so near the main fact under consideration as to constitute a part of the *res gestæ*. Declarations, to become part of the *res gestæ*, must have been made at the time of the act done, which they are supposed to characterize; and must be calculated to disclose the nature and quality of the facts intended to be explained, and so harmonize with them as obviously to constitute one transaction.⁴⁹

The use of abusive language may be shown in connection with acts or threats of physical violence, as characterizing them.⁵⁰ Bruises and marks of violence on the wife may be described, but they must be proved to have been caused by the husband.⁵¹

Physical Condition.

The physical condition of the libellant at the time and subsequent to the ill treatment is material as showing the effect of the cruelty. Ill treatment by the husband while the wife is pregnant is the most extreme form of cruelty.⁵²

⁴⁷ 1 Greenl. Ev. sec. 56.

⁴⁸ 1 Greenl. Ev. secs. 334 and 338; R. L. ch. 175, sec. 20.

⁴⁹ *Com. v. McPike*, 3 Cush. 181; *Lund v. Tyngsborough*, 9 Cush. 41; *Nutting v. Page*, 4 Gray, 584; *Earle v. Earle*, 11 Allen, 1.

⁵⁰ *Dysart v. Dysart*, 1 Rob. Ecc. 106; *Day v. Day*, 56 N. H. 316.

⁵¹ *Dysart v. Dysart*, 1 Rob. Ecc. 106; *Lockwood v. Lockwood*, 2 Curt. Eccl. 281.

⁵² *Jefferson v. Jefferson*, 168 Mass. 456.

Anonymous Letter.

The husband will be permitted to show in explanation of his conduct when charged with cruelty that he had received an anonymous letter, but will not be allowed to put the contents of the letter in evidence.⁵³

87. Record of Conviction.

The record of conviction for assault and battery, which shows that judgment was entered against the husband on his plea of "guilty," is admissible against him as a judicial admission of the fact.⁵⁴ But if the plea had been "not guilty," or *nolo contendere*, it would have been otherwise.⁵⁵

88. Pleading.

It is sufficient if the language of the statute is followed in the allegations with the same precision that is usually required in all statutory pleadings.⁵⁶ Care should be taken that the allegations are sufficiently broad and general to allow the introduction of evidence at the trial of all acts of abusive treatment and violence relied upon.

Instance. — The libel alleges that the libellee "has been guilty of extreme cruelty towards her (the libellant), and particularly on the 23d day of September last inflicted upon her person blows, and then and there did divers other acts of extreme cruelty, to her great injury." In the ordinary language of pleading, this amounts to a specification of the infliction of blows on a single occasion, under such circumstances and in such a manner as to constitute extreme cruelty. The parties went to trial upon this allegation and its denial; and the libellant was permitted to offer evidence of the infliction of blows on a single day, and all the circumstances that occurred on that day, relating as well to the temper, language and manner of the libellee as to the infliction of the blows. But evidence of previous similar, independent instances of ill treatment and misconduct on other occasions was properly excluded as an independent ground of divorce, because it was not pertinent to the issue which the libellant

⁵³ *Mayo v. Mayo*, 119 Mass. 290.

⁵⁴ *Bradley v. Bradley*, 11 Me. 367; *Burgess v. Burgess*, 47 N. H. 395.

⁵⁵ *Bradley v. Bradley*, 2 Fairf. 367; *Woodruff v. Woodruff*, Id. 475; 1 Greenl. Ev. sec. 527a; *White v. Creamer*, 175 Mass. 567.

⁵⁶ See Appendix, Forms Nos. 36 and note, and 37.

had chosen to offer by her allegations. The cause could not be tried upon allegations not made. It would not be in conformity with the rules of pleading, nor just to the libellee, who was entitled to have the matters relied upon set forth, at least by some general allegations, so that he could be prepared to meet them. If the allegations had been general, he might have moved for specifications; but as the allegations were limited to a single specified act, he needed no further specifications, and was bound to meet merely that charge.⁵⁷

This case of *Ford v. Ford* illustrates the disaster which may follow a lack of care in the drafting of the pleadings. If the charges of cruelty are vague and indefinite the libellee may move to have the allegations made more certain and specific, for the libel will otherwise be sustained if it states a cause of action.

In all cases, civil and criminal, the question whether bills of particulars or specifications shall be ordered is within the discretion of the presiding judge, and is not subject to exception.⁵⁸

The Answer.

The libellee in his answer may deny the cruelty or plead justification, recrimination or condonation. These defenses must be specially pleaded, and proved by the libellee at the trial.

⁵⁷ *Ford v. Ford*, 104 Mass. 198; *Brook v. Brook*, 12 P. & D. 19.

⁵⁸ *Com. v. Giles*, 1 Gray, 466; *Com. v. Wood*, 4 Gray, 11; *Gardner v. Gardner*, 2 Gray, 434; *Harrington v. Harrington*, 107 Mass. 329.

CHAPTER VIII.

NON-SUPPORT AS A CAUSE OF DIVORCE.

SECTION.

- 89. Non-Support Defined.
- 90. Imprisonment as Defense.
- 91. Insanity as Defense.
- 92. Liability for Support — Civil and Criminal.
- 93. Pleading.

89. Non-support Defined.

Non-support as a ground for divorce is the willful neglect or refusal of the husband to provide for his wife the common necessities of life. A mere neglect or refusal to provide is not enough. The husband must be of sufficient ability to support his wife, and the refusal or neglect must be accompanied by acts which are gross or wanton and cruel, or by circumstances of a similar nature.¹

Non-support was originally a ground for divorce from bed and board only,² but subsequently an absolute divorce was granted for that cause.³ The mere neglect of a husband, with no circumstances of aggravation, to provide for the maintenance of his wife, who has supported herself from her own earnings, is not such gross or wanton and cruel neglect as will sustain a libel in her behalf. The neglect must be "gross or wanton and cruel" on his part, he being of sufficient ability to provide. These words were used for the purpose of giving to the conduct of the husband, in this respect, the character which they imply, and are not to be disregarded. The non-support contemplated by the statute as a ground of divorce will be insufficient, although the neglect of the husband may have commenced many years before the final separation and continued down to the time of filing the libel, and neither the wife nor her children had in fact suffered or been in danger of suffering from want of support for the sole reason that she, without asking assistance of him since he left her, had relied on her own earnings, which were in no way interfered with by him.⁴

¹ R. L. ch. 152, sec. 1; P. S. ch. 146, sec. 1; St. 1870, ch. 404, sec. 2; Gen. Sts. ch. 107, sec. 9; R. S. ch. 76, sec. 6; St. 1810, ch. 119.

² St. 1810, ch. 119; R. S. ch. 76, sec. 6; Gen. Sts. ch. 107, sec. 9.

³ St. 1870, ch. 404, sec. 2; Pub. Sts. ch. 146, sec. 1; R. L. ch. 152, sec. 1.

⁴ Peabody v. Peabody, 104 Mass. 195; Mandigo v. Mandigo, 15 Vt. 786.

It was said upon a full consideration of the whole subject, that when a divorce is sought on the ground of cruelty, whether it be cruel and abusive treatment or cruelty in neglecting or refusing to provide suitable maintenance for the wife, a reasonable construction of the statute requires that it should appear to be such cruelty as shall cause injury to life, limb or health, or create danger of such injury, or a reasonable apprehension of such danger. A mere neglect to provide, though accompanied by ability, is not enough.⁵ It may be that under some circumstances a sudden and continued refusal to provide the necessaries of life to a wife would be regarded, within the meaning of the statute, as "gross or wanton and cruel," as where from previous habits, or mode of life, or state of health, or incapacity to labor from any cause, such conduct would cause injury to health, or danger of such injury, or reasonable apprehension thereof.⁶

The evidence, upon a libel under the St. of 1870, ch. 404, sec. 2, was, in substance, that the husband left his wife without cause, and remained away for ten months without providing for her: that afterwards he returned, and upon his faithful promise to support and provide for her, she consented to live with him again, and did so till a short time before she was confined by the birth of a child, when at his request she went to the house of her aunt, and he left her again without means of support, and had not for a year prior to the filing of the libel provided for her. It did not appear whether the libellant was or was not able to earn her own living and support her child, but it was proved that the libellee had a trade, and while he resided with his wife he was always well, and then could and did earn from three to three and one-half dollars per day. The libel was dismissed, and it was held, upon exceptions, that it did not appear that the divorce was improperly refused.⁷

Evidence that a wife had, upon one occasion, opened a letter addressed to her husband, had charged him with infidelity, had followed him in the evening in disguise, had opened a trunk belonging to him and taken from thence miniatures of other women, constitutes no defense to her libel for a divorce for his cruel and wanton refusal to provide her with suitable maintenance.⁸

⁵ Bailey v. Bailey, 97 Mass. 373.

⁶ Peabody v. Peabody, *supra*.

⁷ Holt v. Holt, 117 Mass. 202.

⁸ French v. French, 14 Gray, 186.

There are comparatively few cases in our reports in which the words, "grossly or wantonly and cruelly refuses or neglects to provide a suitable maintenance," have received judicial interpretation. It is evidence, however, that something more than mere refusal or neglect is necessary to support a libel for this cause. The refusal or neglect must be accompanied by acts which are gross or wanton and cruel, or by circumstances of a similar nature. No general rule can be laid down, but each particular case must be decided on its own merits and evidence, and by a fair and just discrimination in the application of general principles.

90. In Prison.

If a husband, destitute of property, is committed to prison, he will not have sufficient ability to provide for his wife, and such neglect is not ground of divorce.⁹

91. Husband's Insanity.

The husband's insanity excuses his neglect to provide, and his failure arising solely from mental or physical disease is not a cause of divorce.¹⁰

92. Liability for Support.

A husband, even though a minor, is bound to support his wife. His marriage, even without the consent of his father, emancipates him and entitles him to his wages so far as they may be needed for the support of his family.¹¹

Proceedings in Probate Court.

If the husband is liable for the wife's support, and does not support her, he cannot relieve himself by prohibiting his wife from pledging his credit, or by a general newspaper advertisement, that he will not be liable for her debts, or by special notice to the party who supplied her not to give her credit. If he willfully deserts her she may use for her support property left by him in possession, and pledge his credit for necessities, or proceed against him for separate maintenance by petition to the probate court.¹² The probate court

⁹ Hammond v. Hammond, 15 R. I. 40; Caswell v. Caswell, 66 Vt. 242.

¹⁰ Broadstreet v. Broadstreet, 7 Mass. 474; Baker v. Baker, 82 Ind. 146.

¹¹ Com. v. Graham, 157 Mass. 73.

¹² R. L. ch. 153, sec. 33.

cannot, without the consent of the parties, order a decree to be entered that the husband pay a sum in gross for all support of his wife in the future. If, however, a decree is entered by consent of parties that the husband pay to the wife a sum in gross, as the whole sum to which she is entitled for separate support, and the husband pays such sum to the wife, who gives a receipt for it, and never offers to return it, she thereby waives her right to appeal from the decree upon the ground that the sum awarded is "insufficient for her apparent needs during the probable length of her life."¹³

Criminal Proceedings.

She may also proceed against him criminally for unreasonably neglecting to support her, in which event proof of neglect to provide for the support of the wife will be *prima facie* evidence that such neglect is unreasonable.¹⁴

93. Pleading.

Non-support may be set forth in the general language of the statute. It must be alleged and proved that the husband is of sufficient ability to support his wife.¹⁵ It is not necessary to aver any cruel treatment, except what is involved in the gross or wanton and cruel neglect and refusal of the husband to support his wife when he is of sufficient ability.

A libel charging that the husband has grossly or wantonly and cruelly refused and neglected to provide a suitable maintenance for his wife, he being of sufficient ability, sufficiently sets forth the cause of action.¹⁶

¹³ *Doole v. Doole*, 144 Mass. 278.

¹⁴ St. 1893, ch. 262; R. L. ch. 212, sec. 45.

¹⁵ *Peabody v. Peabody*, 104 Mass. 195; R. L. ch. 152, sec. 1.

¹⁶ *Brown v. Brown*, 22 Mich. 242. See Appendix, Forms No. 41, note, 42, 43 and note.

CHAPTER IX.

CONVICTION OF CRIME AND IMPRISONMENT AS A CAUSE OF DIVORCE.

SECTION.

- 94. Statutory Provisions.
- 95. Sentence Must be to a Prison in this State.
- 96. Classed with other Marital Offenses.
- 97. Indeterminate Sentences.
- 98. Pleading.

94. Statutory Provisions.

The statutes provide that a divorce may be decreed "when either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison or in a jail or house of correction; and after a divorce for such cause no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights."¹

95. State Prison in This State.

The first statute making a sentence to imprisonment a cause of divorce was the Rev. Sts., ch. 76, sec. 5, where the language is substantially the same as that quoted above, except that the term required is seven years or more. Desertion was not made a cause of divorce till afterwards by the St. of 1838, ch. 126, and it is therefore apparent that the sentence to imprisonment was not deemed merely to be substantially equivalent to a desertion. It imported an offense, the nature of which was known to the legislature. Imprisonment elsewhere might be for a cause punishable here for a less term, or possibly not punishable at all. The term "the state prison," when used without further description in the Revised Statutes, as well as in the more recent legislation, means the state prison of this commonwealth.²

Conviction and imprisonment in another jurisdiction is not a cause of divorce in this state. The cause of divorce is fixed by law, and involves a crime of a definite degree and character. To give this statute any other meaning, it would be necessary to ascertain whether the crimes for which convicts are sentenced to foreign penitentiaries are of the same nature and degree as the state prison offense here, and

¹ R. L. ch. 152, sec. 2; P. S. ch. 146, sec. 2; Gen Sts. ch. 107, sec. 6; Rev. Sts. ch. 76, sec. 5.

² *Beard v. Boston*, 151 Mass. 96.

give effect to convictions and imprisonment in such prisons on the ground that they were equivalent to sentences and imprisonment in the state prison of this state, a proceeding which would involve the administration of the law in great difficulty and uncertainty, and not intended by the legislature.³

96. Imprisonment Classed with Other Marital Offenses.

A sentence to imprisonment at hard labor in the state prison for five years or more is classed with adultery and other causes which are grounds for a divorce. A person who has been so sentenced has been guilty of an offense of the same class and degree, under our divorce act, as one who has committed adultery. A husband, therefore, who has been sentenced for the length of time prescribed by this statute is thereby precluded from maintaining a libel for divorce against his wife for her subsequent adultery.⁴

97. Indeterminate Sentences.

The statute of 1895, ch. 504, provides that "when a convict is sentenced to the state prison otherwise than for life, or as an habitual criminal, the court imposing the sentence shall not fix the term of imprisonment, but shall establish a maximum and minimum term for which said convict may be held in said prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offense of which he is convicted, and the minimum term shall not be less than two and one-half years."

The libellee was sentenced to the state prison under this statute for not less than three or more than six years, and the question arose whether he was sentenced for five years or more, within the meaning of the divorce law. In the interval between the two dates fixed, the convict is under sentence to imprisonment. He is all the time in the custody of the law under his sentence, and is under sentence during the whole of the maximum term. It is not to be presumed that the legislature, in adopting a system of indeterminate sentences for con-

³ Leonard v. Leonard, 151 Mass. 151; S. C., 6 L. R. A. 632; Martin v. Martin, 47 N. H. 53; Klutts v. Klutts, 5 Sneed, 423.

⁴ Handy v. Handy, 124 Mass. 394; Hall v. Hall, 4 Allen, 39; Clapp v. Clapp, 97 Mass. 531; Nagel v. Nagel, 12 Misso. 53; Conant v. Conant, 10 Cal. 249; Adams v. Adams, 2 C. E. Green, 324-328; see Yeatman v. Yeatman, L. R. 1 P. & D. 489; Lempiere v. Lempiere, L. R. 1 P. & D. 569.

victs in the state prison, intended to change the rights of persons under the laws relating to divorce. Those rights are best preserved by treating these sentences as in effect during their maximum term, rather than only during the minimum term. A sentence for not more than six years nor less than three years is a sentence to imprisonment for more than five years within the meaning of R. L., ch. 152, sec. 2.⁵

Identity.

The identity of the party convicted must be proved, and where the name differs somewhat in the libel from the name which appears in the record of conviction, evidence may be received that these designations apply to the same person.⁶

98. Pleading.

The libel for divorce for this cause should set out the court which rendered the sentence, and the terms of the sentence. It must be alleged that the imprisonment is in some state prison within the state.⁷ It should also appear that the conviction is final, and that no proceedings for reversal are pending.⁸

⁵ *Oliver v. Oliver*, 169 Mass. 592.

⁶ *Utsler v. Utsler*, Wright, 627.

⁷ *Leonard v. Leonard*, 151 Mass. 151; *Martin v. Martin*, 47 N. H. 53; *Klutts v. Klutts*, 5 Sneed, 423.

⁸ See Appendix, Forms Nos. 44 and note, and 45.

CHAPTER X.

LEGISLATIVE DIVORCES.

SECTION.

99. In General.

100. Formerly Granted by Special Act.

101. Now are Prohibited by the Constitution of the State.

99. In General.

The legislature of a state, in the absence of constitutional restrictions, has the power to grant divorces by special act; and such an act is not within the constitutional prohibition against laws impairing the obligation of contracts. But in Massachusetts, legislative divorces are prohibited by constitutional provisions.

100. Formerly Granted by Special Act.

The English ecclesiastical courts, at the time of the settlement of this country, were limited to the granting of divorces from bed and board, and could not decree a divorce a vinculo matrimonii. This power was exercised by parliament, which continued to grant divorces after the Divorce Act of 1858 had been passed.¹ The colonial legislatures, accordingly, followed the example of parliament, and treated the subject as within their province. It has been held by the supreme court of the United States that a special statute of a territorial legislature dissolving the marriage relation between a husband resident in the territory and a wife who was a non-resident was a valid act of legislative power, and that it was not rendered invalid by the fact that there was no cause of divorce, and that the wife was not notified. It was also held that such a statute does not contravene the provision of the federal constitution, which prohibits laws that impair the obligation of contracts, since marriage is not a contract within the meaning of that provision.²

Chancellor Kent says that "during the period of our colonial government, for more than one hundred years preceding the revolution, no divorce took place in the colony of New York; and for many

¹ 1 Bl. Com. 441; Hewat's Divorce Bill, L. R. 12 App. 312; Joynt's Divorce Bill, L. R. 13 App. 741.

² Maynard v. Hill, 125 U. S. 190; State v. Tutty, 41 Fed. Rep. 753; 2 Kent's Com.* 107 and note (14th ed.).

years after New York became an independent state there was not any lawful mode of dissolving a marriage in the lifetime of the parties but by a special act of the legislature.”³

101. Now Are Prohibited by the Constitution of the State.

The question of divorce involves investigations of a judicial nature.⁴ The exercise of this power by the legislative department depends upon the constitution of the state. The 30th Article of the Declaration of Rights prefixed to the constitution declares that in the government of this commonwealth the legislative department shall never exercise the executive and judicial powers or either of them. The third chapter of the constitution, entitled “Judiciary Power,” contains this article: “All causes of marriage, divorce, and alimony, and all appeals from the judges of probate, shall be heard and determined by the Governor and Council, until the legislature shall by law make other provision.” The word “causes” is evidently here used as equivalent to “controversies” or “cases;” and the terms, as well as the position of this article in the constitution, manifest the intention of the people, in establishing a frame of government, to commit the hearing and determination of all cases of divorce to the judiciary only. The reason for temporarily entrusting the jurisdiction of these matters to the Governor and Council doubtless was that it had been vested in them under the Province Charter.

One of the earliest acts of the General Court of the Province provided that “all controversies concerning marriage and divorce shall be heard and determined by the Governor and Council,” and another act, not long after, authorized them, upon proof of long absence of a husband or wife without being heard of, to declare that the other party should be deemed single and unmarried, and to grant leave to that party to marry again.⁵

The Governor and Council having been thus constituted a court for the decision of cases of marriage and divorce, their proceedings as such, though not according to the course of the common law, were judicial, and were determined by a vote of a majority of those present, even if the Governor was in the minority. This was settled by the

³ 2 Kent's Com. 97.

⁴ 2 Kent (14th ed.) 106; *Shaw v. Gould*, L. R. 3 H. L. 55-91.

⁵ Prov. Sts. 1692-93 (4 W. & M.) ch. 25, sec. 4; 1698 (10 W. III.) ch. 19; 1 Prov. Laws (State ed.) 15, 61, 354; Anc. Chart. 32, 243, 322.

Privy Council in England, after long differences between the Governor and the Council of the Province, as appears from a message of Governor Hutchinson and the answer of the House of Representatives in 1774, the material parts of which are printed in a collection of Massachusetts State Papers, 1765-1775, published in Boston in 1818, 410, 411.⁶

The legislature, in the execution of the power conferred upon it by the constitution, provided by the Statute of 1785, ch. 69, that all questions of divorce and alimony should be heard by the Supreme Judicial Court, and that its decrees should be final. In 1792, the legislature passed a resolve "for dissolving the bond of matrimony" between the parties therein named, but this resolve was vetoed by Governor Hancock, for the reason that, in his opinion, before the Statute of 1785, ch. 69, was passed, the Governor and Council had, by the constitution, exclusive authority to decree divorces, and that after that statute was passed the same exclusive authority was in the Supreme Judicial Court.⁷ It is not known that the legislature has since attempted to dissolve a marriage.⁸

A few similar acts or resolves have been passed in recent times attempting to interfere with judicial proceedings, but they have never been recognized as valid by the Supreme Judicial Court.

A special act of the legislature, declaring two persons "to be husband and wife to all intents and purposes," one of whom has been divorced from a former wife for his desertion, and has not obtained from the court, as the law then required, leave to marry again, is unconstitutional.⁹

The legislature also has no power to confirm proceedings in insolvency commenced by petition of creditors, and had before a person claiming to act as judge of insolvency, but with no title to the office, and which have been adjudged invalid by a judicial decree, for the obvious reason that it was an encroachment of the legislature upon the judicial department of the government.¹⁰

⁶ See also Message of Governor Powall to the Council in 1760; Quincy, 573; *Peters v. Peters*, 8 Cush. 529, 541.

⁷ 12 Journals of the Senate, 190-192.

⁸ *Shannon v. Shannon*, 2 Gray, 285; *Sparhawk v. Sparhawk*, 116 Mass. 315.

⁹ *White v. White*, 105 Mass. 325.

¹⁰ *Denny v. Mattoon*, 2 Allen, 361; *Fayerweather v. Dickinson*, 2 Allen, 385 (note).

The legislature undoubtedly has the power by general laws to specify the grounds and regulate the forms of divorce in future cases, and even to authorize the courts to entertain application for an absolute decree for causes already occurred, and which at the time of their occurrence were grounds for a divorce from bed and board only. But the legislature has no authority under the constitution of Massachusetts to grant divorces, nor can it substantially alter the nature and effect of judgments or decrees already rendered by the courts without violating the constitution, which prohibits it from exercising judicial power.¹¹

It has also been held that a special statute of Maine, authorizing the Supreme Judicial Court of that state, in its discretion, to decree a divorce between individuals named, is unconstitutional, as granting a special indulgence by way of exemption from the general rule, and consequently of no effect in this commonwealth.¹²

A retrospective statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void, as it is a part of our constitutional law that the legislature shall not exercise judicial power. The legislature has no authority under the constitution to suspend the operation of a general law in favor of an

¹¹ Sparhawk v. Sparhawk, 116 Mass. 315; *Ståte v. Fry*, 4 Mo. 120, 138; *Jones v. Jones*, 95 Ala. 443; *Simonds v. Simonds*, 103 Mass. 572; *Teft v. Teft*, 3 Mich. 67.

¹² *Simonds v. Simonds*, 103 Mass. 572. In this case the court argued and cited Maine decisions to prove that the divorce would be invalid in Maine. But it was a decision of the highest judicial tribunal of Maine, and would not have been rendered unless the act had been considered constitutional. The decree necessarily involved the validity and constitutionality of the statute. The New York court, in *Hunt v. Hunt*, 72 N. Y. 217, 231-233, in passing upon a Louisiana divorce, declined to inquire whether or not it was void in Louisiana, as violating the constitution of Louisiana. The learned judge who delivered the opinion distinguished that case from *Simonds v. Simonds*. He said that the Massachusetts court "satisfied itself by the decisions of the courts of Maine, which it cited (*Lewis v. Webb*, 3 Greenl. 326; *Durham v. Lewiston*, 4 Greenl. 140; *Adams v. Palmer*, 51 Me. 480), that the divorce would not be considered valid in that state, and therefore felt justified in holding it invalid in Massachusetts." In the New York case, no such distinct evidence of the decisions of the Louisiana tribunals appeared. The Maine court did not take the same view of the effect of the Maine decisions cited which the Massachusetts court did; otherwise the divorce would not have been granted. It is matter of opinion which court is right, and the question arises whether the courts of our several states are to sit as tribunals to determine appeals from one another's courts and legislatures, and to pass upon the interpretation and effect of a constitution not in force within its jurisdiction.

individual.¹³ But a law changing the effect of decrees of divorce may apply to divorces subsequently granted for causes arising before the statute was passed, as the statute of March 7, 1806, respecting marriage and divorce, applies to divorces decreed after the passing it, whether the adultery was committed before or after the date of the statute.¹⁴ Legislative divorces are now prohibited in nearly all the states, but in those jurisdictions where they are permitted, if the courts there are allowed by statute to grant divorces for certain causes, the legislative divorce can only be granted for causes not enumerated in the statute.¹⁵

The consensus of opinion seems to be, judging from the great number of constitutional provisions prohibiting legislative divorces, that such special laws are in effect not only an encroachment on the judicial department, but also violate the constitution by impairing vested rights.

¹³ 1 Kent's Com. 455; *Holden v. James*, 11 Mass. 396; *Forster v. Forster*, 129 Mass. 559; *Picquet, Appellant*, 5 Pick. 65; see *Rice v. Parkman*, 16 Mass. 332, note.

¹⁴ *West v. West*, 2 Mass. 223.

¹⁵ Opinion of Supreme Judicial Court, 16 Me. 479.

CHAPTER XI.

VACATING DECREES OF DIVORCE.

102. Party to Fraud Cannot Set Aside the Decree.
103. Writ of Review Will Not Lie.
104. Petition to Vacate is the Proper Remedy.
105. Objections to a Decree Nisi Being Made Absolute.
106. Application to Vacate Must be by Party in Interest.
107. Decree will not be Vacated After Death of Either Party.
108. Criminal Liability — Procuring Unlawful Divorce — Personating, False Testimony, Unlawful Issuing of Certificate of Divorce.
109. Advertising to Procure Divorce.

102. The Decree Nisi and the Decree Absolute May Be Set Aside Upon Petition for Fraud, or When the Decree, for Any Cause, is Unauthorized by Law.

The courts are governed by the same principles as to opening and reversing decrees of divorce as in other causes.

It has often been held, both here and in England, that fraud in procuring a decree of divorce will avoid it.¹ These decisions are confirmed by numerous authorities establishing the invalidity of divorces obtained in another state in fraud of the law of domicil, or by imposition on the court.² A party to a fraud whereby a decree was obtained cannot maintain proceedings to set the decree aside.³

103. Writ of Review Does Not Lie.

A writ of review will not lie to revise a decree dismissing a libel for divorce, because it is not a "civil action" within the meaning of the statutes allowing reviews in all civil actions.⁴ The case of *Lucas v. Lucas*, supra, merely decides that under the limited terms of our statute review does not lie to vacate a decree of divorce. Neither can a decree of divorce from the bond of matrimony, although

¹ *Carley v. Carley*, 7 Gray, 545; *Dunn v. Dunn*, 4 Paige, 425; *Shelford on Mar. & Div.* 475; *Adams v. Adams*, 51 N. H. 388.

² *Hanover v. Turner*, 14 Mass. 227; *Lyon v. Lyon*, 2 Gray, 367; *Harding v. Alden*, 9 Greenl. 140, 151; *Jackson v. Jackson*, 1 Johns. 424; *Borden v. Fitch*, 15 Johns. 121, 145; 2 Kent's Com. 109 (14th ed.).

³ *Greene v. Greene*, 2 Gray, 361; *Brigham, Petitioner*, 176 Mass. 227, 228; *Adams v. Adams*, 51 N. H. 388.

⁴ *Lucas v. Lucas*, 3 Gray, 136.

obtained by fraud and false testimony, be set aside on an original libel filed at a subsequent term.⁵

A decree of divorce a vinculo, where no appeal, review or writ of error is allowed by law, or when the time for bringing such review or writ of error has expired, is final and conclusive upon the parties, and an original proceeding to set it aside on the ground that it was fraudulently obtained, upon false evidence, cannot be maintained. The attempt in *Greene v. Greene*, supra, was to set aside, by another libel for divorce, a decree rendered in a case fully heard after notice and upon defense made. It was not a case of fraudulent judgment, but only of an allegation that false testimony had been offered to the court, the question of the truth or falsity of which was *res adjudicata*.

104. Petition to Vacate, the Proper Remedy.

The proper form of proceeding is by petition to vacate the former decree whether it is a decree nisi or a decree absolute. The court may properly in the same proceedings not only vacate the decree nisi and the decree absolute, but may dismiss the libel, or enter any order that justice requires.⁶

In *Wiley v. Wiley*,⁷ the defendant knowing that he could not legally marry within six months after the entry of the decree nisi, nevertheless married again within that time, both he and his wife using assumed names. The defendant subsequently had the decree nisi made absolute, fraudulently concealing the fact of his second marriage. The decrees were revoked and set aside upon petition, and the libel dismissed.

The court has power upon petition of the party aggrieved to vacate a decree of divorce obtained against the petitioner by false testimony, on a libel of which she had no actual notice, knowledge of which was fraudulently kept from her by the other party, and of which the court had only an apparent jurisdiction founded on his false allegations of domicile.⁸

In *Edson v. Edson* ⁹ the court says, among other things: "We believe it to be an established principle of jurisprudence that courts

⁵ *Greene v. Greene*, 2 Gray, 361.

⁶ *Wiley v. Wiley*, 161 Mass. 446.

⁷ 161 Mass. 446.

⁸ *Edson v. Edson*, 108 Mass. 590.

⁹ 108 Mass. 590.

of justice have power, on due proceedings had, to set aside or vacate their judgments and decrees whenever it appears that an innocent party, without notice, has been aggrieved by a judgment or decree obtained against him without his knowledge by the fraud of the other party. Nor is this principle limited in its operation to courts which proceed according to the course of the common law. It is equally applicable to courts exercising jurisdiction in equity, and to tribunals having cognizance of cases which are usually heard and determined in the ecclesiastical courts. In tribunals of the last named description, whose decrees cannot be revised by writ of error or review, the proper form of proceeding is by petition to vacate the former decree as having been obtained by fraud upon the party and imposition upon the court. The case of *Greene v. Greene*, 2 Gray, 361, which is cited and relied on by the respondent, is not in conflict with the general current of authorities. Some of the general expressions used by the court, when disconnected from the facts of the case there in adjudication, have been thought to give sanction to the doctrine that a decree of divorce, when once obtained, could not be impeached in any form of proceeding, or set aside by one of the parties to the original suit, however fraudulent and collusive may have been the conduct of the other party in its procurement. But such a conclusion is not a fair and legitimate result of the language and reasoning of the court, when considered, as it ought to be, solely with reference to the actual case before the court. The attempt there was, upon a new libel for divorce, to try again a case which had before been adjudicated between the same parties after due notice and opportunity for a full hearing on the merits. Strictly speaking, the decision is an authority only for the proposition that a decree of divorce cannot be called in question, or invalidated, on the ground of fraud in its procurement, in a separate and independent libel subsequently brought between the same parties, when it appears that the first decree was entered after due notice to the adverse party, followed by an adjudication upon evidence offered in support of the allegation in the libel. To this extent there can be no doubt that the decision is in harmony with sound principle and with adjudicated cases. But beyond this, which was the precise point adjudicated, the authority of the case cannot be properly extended."

The statute confers ample powers on the court in all cases where

the course of procedure is not specially prescribed, and even in the absence of statutory provision it has been held that like power would exist.¹⁰

A decree of divorce nisi, inadvertently granted without authority under a statute which has been repealed, is of no legal effect, and should be set aside and vacated.¹¹ So, also, a divorce obtained by fraud, and without the knowledge of the libellee, may be set aside on the application of the libellee during the same term.¹² But a decree of divorce will not be vacated and set aside by the court after the term at which it was entered, without clear proof that the libellee was prevented by fraud of the libellant or imposition upon the court from being heard in the original suit upon some matter which, if then proved, would have constituted a good defense.¹³

In the absence of fraud in obtaining it, a decree nisi will not be opened three years after it was granted to let in evidence to contradict facts upon which it was founded.¹⁴ A decree of divorce will not be vacated on the ground that since the decree the petitioner has been made, by a change in the law, an admissible witness to testify to his own innocence, nor after the lapse of twelve years, that the adverse party suborned witnesses, when all the evidence to sustain that charge was known to the party making it, at the time of the trial, and that the adverse party induced the petitioner's witnesses to secrete themselves and avoid testifying, when it does not appear that the petitioner took any means to procure their attendance or to obtain a postponement of the trial.¹⁵

105. Objections to a Decree Absolute.

But at any time before the expiration of six months from the granting of a decree of divorce nisi the libellee, or any other person, may file in the office of the clerk for the county in which the libel is pending a statement of objections to an absolute decree, setting forth the facts on which it is founded, verified by affidavit. The filing of

¹⁰ St. 1785, ch. 69, sec. 8; St. 1820, ch. 56, sec. 1; R. S. ch. 76, sec. 38; Gen. St. ch. 107, sec. 53; P. S. ch. 146, sec. 33; R. L. ch. 152, sec. 29.

¹¹ *Wales v. Wales*, 119 Mass. 89.

¹² *Carley v. Carley*, 7 Gray, 545.

¹³ *Holbrook v. Holbrook*, 114 Mass. 568; *Whiting v. Whiting*, 114 Mass. 494.

¹⁴ *Whiting v. Whiting*, 114 Mass. 494.

¹⁵ *Holbrook v. Holbrook*, 114 Mass. 568.

the objections within the prescribed time, ipso facto, prevents the decree nisi from being made absolute; thus rendering it unnecessary to apply to the court for a special order.¹⁶ The decree absolute on such application may not only be refused, but upon a proper case being made out the decree nisi may be revoked and the libel dismissed.¹⁷ It is also within the power of a single justice, where a cause arises after the six months, which may influence his decision in refusing to make a decree absolute, to admit evidence thereof.¹⁸

106. The Application to Vacate Must be Made By a Party in Interest.

A person, in order to be entitled to vacate a decree of divorce, must have been a party to the original suit or affected by the judgment. A stranger to the proceedings has no standing in court. A man's heirs at law consequently have no right to maintain a suit to set aside the divorce of a woman obtained by fraud and perjury from a former husband, for the purpose of defeating her claims as a widow against the property of their intestate, which, but for the alleged fraudulent divorce from her first husband and subsequent marriage to the plaintiffs' intestate, would have descended to them. They were not parties to the divorce proceedings, and had no interest therein.¹⁹

107. A Decree of Divorce Will Not Be Vacated After the Death of Either Party.

It is very clear that divorce proceedings generally are ended by the death of a party. They are conspicuous examples of those personal actions which die with the person. To state the same result from a different point of view, in general, an executor does not represent his testator for the purposes of a matrimonial cause. It follows, therefore, that a suit cannot be maintained to vacate a decree of divorce after the death of either party.²⁰

¹⁶ Divorce, Rule V; R. L. ch. 152, sec. 18; St. 1893, ch. 280.

¹⁷ *Moors v. Moors*, 121 Mass. 232.

¹⁸ *Pratt v. Pratt*, 157 Mass. 503 (1892).

¹⁹ *Tyler v. Aspinwall*, 73 Conn. 493.

²⁰ *Stanhope v. Stanhope*, 11 P. D. 103; *Brigham, Petitioner*, 176 Mass. 223, 226; *Rawson v. Rawson*, 156 Mass. 578.

108. Criminal Liability — Procuring Unlawful Divorce — Personating, False Testimony, Etc. — Unlawfully Issuing Certificates of Divorce.

It is a criminal offense for a person to procure or assist another to procure or obtain any false, counterfeit or fraudulent divorce or decree of divorce, or any divorce or decree of divorce from a court of another state for or in favor of a person who, at the time of making application therefor, was a resident of this commonwealth, such court not having jurisdiction to grant such decree,²¹ or falsely to personate another or willfully and fraudulently procure a person to personate another, or fraudulently procure false testimony to be given, or make a false or fraudulent return of service of process upon a libel for divorce or in any proceeding connected therewith,²² or, except in compliance with an order of a court of competent jurisdiction, to give, sign or issue any writing which purports to grant a divorce to persons who are husband and wife, according to the laws of this commonwealth, or which purports to be a certificate that a divorce has been granted to such persons.²³

109. Advertising to Procure Divorces.

It is also a criminal offense for a person not duly admitted as an attorney at law in this commonwealth to write, print or publish, or solicit another to write, print or publish, any notice, circular or advertisement soliciting employment in the business of procuring divorces or offering inducements for the purpose of procuring such employment.²⁴

²¹ R. L. ch. 152, sec. 38.

²² R. L. ch. 152, sec. 37.

²³ R. L. ch. 152, sec. 40.

²⁴ R. L. ch. 152, sec. 39.

CHAPTER XII.

DEFENSES — CONDONATION.

SECTION.

- 110. Condonation Defined — Its General Scope.
- 111. No Statutes Respecting Condonation.
- 112. Condonation a Question of Fact.
- 113. Forgiveness Conditional.
- 114. What Amounts to Condonation.
- 115. Knowledge of the Offense.
- 116. Must be Specially Pleaded.

110. Condonation Defined, Its General Scope.

Condonation is the forgiveness of a marital offense, and bars the right to a divorce. But condonation is upon condition that the wrongdoer shall commit no matrimonial offenses in the future, and shall thereafter treat the other with conjugal kindness. A breach of the condition will revive the right to a remedy for the former injury. Condonation may be by express words, if acted upon; or may be inferred from conduct alone.

The forgiveness or remission by one of the spouses of a marital offense committed by the other is, in law, such a condonation as will bar a divorce therefor.¹ The whole doctrine of condonation proceeds upon the ground that there is, in law, no such thing as an unpardonable offense against the marriage relation. Even adultery is not universally found to be unpardonable in actual experience, and is not deemed to be so in law. It is an offense which may, at the option of the injured party, serve as the ground for a divorce; or it may be overlooked and forgiven. Condonation restores equality before the law. If the injured party is willing to forgive the offense the law will give full effect to that forgiveness.²

A married woman, who has committed adultery and confessed it to her husband, and been expressly forgiven by him, and who has lived

¹ Sewall v. Sewall, 122 Mass. 156; Cumming v. Cumming, 135 Mass. 386; Anon., 6 Mass. 147; Johnson v. Johnson, 14 Wend. 637; Quincy v. Quincy, 10 N. H. 272; Durant v. Durant, 1 Hagg. Ecc. 733; Westmeath v. Westmeath, 2 Hagg. Eccl. Supp. 1; Ferrers v. Ferrers, 1 Hagg. Con. 130; D'Aguilar v. D'Aguilar, 1 Hagg. Ecc. 773.

² Cumming v. Cumming, 135 Mass. 391.

with him for several years thereafter, is not debarred from maintaining a libel for a divorce on the ground of his adultery, committed after such period of cohabitation.³

It has sometimes been supposed that the doctrine of condonation arising from continued cohabitation was inapplicable to cases of libel by the wife seeking a divorce for extreme cruelty, and there are decisions to that effect.⁴ But the better established rule seems to be that cruelty as well as adultery may be the subject of condonation.⁵ This doctrine not only applies to adultery, but to every other offense that constitutes a ground for a divorce.⁶

111. No Statutes Respecting Condonation.

The statutes contain no provision respecting condonation, and the court has assumed that the legislature intended to adopt the general principles which had governed the ecclesiastical courts of England in granting divorces from bed and board, so far as those principles are applicable, and are found to be reasonable. This assumption does not go so far as to embrace the recent statute law of England in relation to divorce.⁷

112. Condonation a Question of Fact.

Whether certain conduct amounts to condonation or not is a question of fact for the jury to decide under instructions, when it is a jury case.⁸ But since divorce causes are no longer tried by jury,⁹ condonation is a question of fact for the single justice who tries the case to determine. His decision on a question of fact in matters of divorce cannot be revised by the full court, either on exceptions,¹⁰ or

³ *Cumming v. Cumming*, 135 Mass. 386; *Masten v. Masten*, 15 N. H. 159; *Jones v. Jones*, 3 C. E. Green, 33.

⁴ *Perkins v. Perkins*, 6 Mass. 69; *Hollister v. Hollister*, 6 Barr. 449.

⁵ *Gardner v. Gardner*, 2 Gray, 434; *Robbins v. Robbins*, 100 Mass. 150; *Burr v. Burr*, 10 Paige, 20; *Whispell v. Whispell*, 4 Barb. 217; *Masten v. Masten*, 15 N. H. 159.

⁶ *Gardner v. Gardner*, 2 Gray, 434; overruling *Perkins v. Perkins*, 6 Mass. 69.

⁷ *Robbins v. Robbins*, 140 Mass. 528; *Morrison v. Morrison*, 142 Mass. 363; *Pratt v. Pratt*, 157 Mass. 506.

⁸ *Cairns v. Cairns*, 109 Mass. 408; *Peacock v. Peacock*, 1 Swab. & T. 183; *Keats v. Keats*, 1 Swab. & T. 334-345.

⁹ St. 1877, ch. 148, sec. 4.

¹⁰ *Smith v. Smith*, 167 Mass. 87.

appeal,¹¹ or report.¹² In other words, it cannot be said as matter of law that his finding is not justified by the evidence.¹³

The whole court will not reconsider a finding, upon a matter of fact, of a single justice before whom a case has been tried, without a jury.¹⁴ To sustain an appeal from the superior court the record must show an error of law.¹⁵

113. Forgiveness Conditional.

Condonation is not absolute remission, but proceeds upon the idea of repentance, and is not operative where subsequent acts show that there was no repentance. Condonation is a conditional forgiveness, and a repetition of the offense revives the remedy. When the condition is not expressed, the law implies a condition, not only that the particular offense shall not be repeated, but also that the offender shall treat the other with conjugal kindness. A breach of this condition will revive the original offense as a ground of divorce, and it may be relied upon for this purpose as fully as if it had never been condoned. A condoned offense, whatever it may be, is therefore revived if the wrongdoer is subsequently guilty of adultery, cruelty, desertion, or any other breach of conjugal kindness.¹⁶

Where a wife dismisses a libel for divorce, and agrees to condone the husband's previous offenses and to live with him again if he will not commit further acts of adultery, and he does afterward commit adultery, such dismissal, agreement and condonation will not bar the wife from suing for a divorce for either his earlier or later acts of adultery.¹⁷

The law is settled in this commonwealth, in accordance with the doctrine declared by Lord Stowell and Sir John Nicholl in the

¹¹ Sparhawk v. Sparhawk, 120 Mass. 390.

¹² Stuart v. Stuart, 123 Mass. 370; Morrison v. Morrison, 136 Mass. 310.

¹³ Maglathlin v. Maglathlin, 138 Mass. 299; Bill v. Stewart, 156 Mass. 508; Osborn v. Osborn, 174 Mass. 399.

¹⁴ Jamaica Pond Aqueduct v. Chandler, 9 Allen, 159-166.

¹⁵ Dorr v. Richardson, 114 Mass. 346.

¹⁶ Sewall v. Sewall, 122 Mass. 156; French v. French, 14 Gray, 186; Robbins v. Robbins, 100 Mass. 150; Bramwell v. Bramwell, 3 Hagg. Con. 618; Burr v. Burr, 10 Paige, 20; Smith v. Smith, 4 Paige, 432; Durant v. Durant, 1 Hagg. Ecc. 733; Dent v. Dent, 4 Swab. & T. 105; Smith v. Smith, 167 Mass. 87; Newsome v. Newsome, L. R. 2 P. & D. 313; Rowley v. Rowley, L. R. 1 H. L. Sc. 63, 65, 68.

¹⁷ Sewall v. Sewall, 122 Mass. 156; Smyth v. Smyth, 4 Hag. Ecc. 509.

English ecclesiastical courts, that any condonation by the wife of her husband's cruelty is on the implied, if not express, condition of his treating her in the future with conjugal kindness; that any breach of this condition will revive the right to maintain a libel for the original offense; and that such a breach may be shown by act, word, or conduct which would not of themselves prove a cause of divorce. Harshness and rudeness not sufficient to maintain a libel may receive a different interpretation and effect upon the question of condonation after proof that the husband has previously gone to the length of positive acts of cruelty.¹⁸ Here words of heat and passion, and any acts of violence in conduct causing a reasonable apprehension of renewed acts of cruelty, would be properly before the court, and might fully answer all grounds of defense arising from alleged condonation.¹⁹ It is no doubt true that much less is sufficient to destroy condonation than to found an original suit.²⁰

114. What Amounts to Condonation.

Condonation may be by express words of forgiveness;²¹ but an offer to forgive will not amount to condonation unless it is accepted or acted upon by the other party.²² Condonation may also be implied from the conduct of the parties. Sexual intercourse, for instance, with knowledge of a prior offense, is such condonation.²³ Voluntary cohabitation after one knows or has reasonable and strong grounds to believe adultery has been committed is condonation.²⁴ But it is otherwise when the reunion of the parties is involuntary, as

¹⁸ *Robbins v. Robbins*, 100 Mass. 150; *Burr v. Burr*, 10 Paige, 20; *Gardner v. Gardner*, 2 Gray, 434; *Jefferson v. Jefferson*, 168 Mass. 456; *Smith v. Smith*, 167 Mass. 87; *Osborn v. Osborn*, 174 Mass. 399; *Johnson v. Johnson*, 1 Ed. Ch. 439.

¹⁹ *Gardner v. Gardner*, 2 Gray, 434; *Beeby v. Beeby*, 1 Hag. Eccl. 789; *Osborn v. Osborn*, 174 Mass. 399.

²⁰ *D'Aguilar v. D'Aguilar*, 1 Hag. Eccl. 773; *Jefferson v. Jefferson*, 168 Mass. 456.

²¹ *Sewall v. Sewall*, 122 Mass. 156; *Beeby v. Beeby*, 1 Hag. Eccl. 789; *Quincy v. Quincy*, 10 N. H. 272.

²² *Keats v. Keats*, 1 Swab. & T. 334; *Popkin v. Popkin*, 1 Hag. Eccl. 765; *Ferrers v. Ferrers*, *id.* 781, note.

²³ *Snow v. Snow*, 2 Notes of Cas. 13; *Dillon v. Dillon*, 3 Curt. Ecc. 86; *Timmings v. Timmings*, 3 Hag. Ecc. 76; *Delliber v. Delliber*, 9 Conn. 233.

²⁴ *Anon.*, 6 Mass. 147; *North v. North*, 5 Mass. 320; *Maglathlin v. Maglathlin*, 138 Mass. 299; *Johnson v. Johnson*, 14 Wend. 637 (Lawyer's Coöp. Ed. note); *Wood v. Wood*, 2 Paige, 108.

where it is the result of fraud or duress. A return to cohabitation induced by false assurances will not constitute condonation, if the innocent party leaves on discovery of the deceit. Condonation will not be inferred if the husband compels the wife to occupy his room by threats of violence.²⁵

Condonation is not so easily to be inferred against the wife, from her cohabitation, as it might be against the husband. The state of the respective parties differs materially in their opportunities of at once withdrawing from the scene of discord and violence, for the reason that she may be more under marital authority and more destitute of advice and assistance. She may find a difficulty in quitting her husband's house. It has accordingly been considered that the force of a condonation, as a bar to proceedings for a divorce, varies according to the circumstances. Forbearance for a season may be not only a justifiable, but a necessary step on the part of the wife; and when shown to have been so, no condonation is to be inferred from such cohabitation. Delay on her part may be justified by the necessity which compels it, or by a laudable desire to avoid a rupture of the family ties till forbearance ceases to be a virtue.²⁶

115. Knowledge of Offense.

Condonation, when relied on as a bar to an application for a divorce, implies some knowledge of the offense committed, and some degree of belief in its existence, and does not apply to unknown offenses. Not only must there be knowledge of the existence of the facts, but there must also be a belief in their existence and of the party's ability to prove them. Suspicion is not knowledge, nor is it belief.²⁷ When sufficient grounds for the inference are presented in the facts proved in their ordinary effect upon the mind, such knowledge is presumed.²⁸ But forgiveness of one act is not forgiveness of other acts of which the forgiving party had neither knowledge nor reasonable ground of belief; nor does readiness to forgive a single

²⁵ *Popkin v. Popkin*, 1 Hag. Ecc. 765. note; *Cooke v. Cooke*, 3 Sw. & T. 126.

²⁶ *Gardiner v. Gardiner*, 2 Gray, 434; *Cumming v. Cumming*, 135 Mass. 388; *Shelf, Mar. & Div.* 445; *Wood v. Wood*, 2 Paige, 108; *D'Aguilar v. D'Aguilar*, 1 Hag. Ecc. 773; *Beeby v. Beeby*, 1 Hag. Ecc. 789.

²⁷ *Clark v. Clark*, 97 Mass. 331; *Bernstein v. Bernstein*, (1893) P. 292.

²⁸ *Anon.*, 6 Mass. 147.

offense imply willingness to forgive a life of profligacy.²⁹ Whether the condonation in any given case is to be confined to one or more acts, or is to have a broader effect, so as to include all past offenses, is a question to be decided by the language and conduct of the parties, in view of the facts then known or reasonably suspected by the forgiving party.³⁰

It is not necessary, when the terms of the condonation indicate an intention to forgive, without inquiry, all previous injury, that there should be actual knowledge of each distinct offense; it is enough if full forgiveness is granted upon well-founded belief.³¹ When the knowledge of the adultery is general, and not of any particular act, and the forgiveness is general, it cannot be applied to any one act more than to all. It is not necessary, in such a case, that there be actual knowledge of each distinct offense to make the condonation complete.³²

On a libel for divorce on the ground of adultery of the husband, there was evidence that the husband, upon his wife's discovery that he had contracted a venereal disease, admitted it, in general terms, to be true; that the wife had no knowledge and was not informed of his adultery in time, place or person with whom the offense was committed, or its frequency; that the wife, after her discovery and before their separation, several times occupied the same sleeping room with her husband; and that there were prior acts of adultery of which the wife knew nothing until after the filing of her libel. It was held that the evidence would warrant a finding that she had condoned all his acts of adultery.³³

116. Alleged in Answer.

The defense of condonation is in the nature of a plea in confession and avoidance, and the libellee accordingly has the burden of establishing it. It should be specially pleaded in the answer, in order to

²⁹ *Morrison v. Morrison*, 142 Mass. 361; *Alexandre v. Alexandre*, L. R. 2 P. & D. 164; *Bernstein v. Bernstein*, 6 Reports, 609.

³⁰ *Durrant v. Durrant*, 1 Hag. Ecc. 733; *D'Aguilar v. D'Aguilar*, 1 Hag. Ecc. 773.

³¹ *Keats v. Keats*, 1 Sw. & Tr. 346.

³² *Rogers v. Rogers*, 122 Mass. 423; *Shackleton v. Shackleton*, 48 N. J. Eq. 364.

³³ *Rogers v. Rogers*, 122 Mass. 423.

enable the libellee to avail himself of it as a defense. If omitted by mistake or ignorance, the defect may be cured by amendment.³⁴

Evidence.

The libellee must prove condonation, and show that forgiveness was given freely, with full knowledge of the facts, with ability to prove them, and a belief of guilt. A case must be made out which does not disclose a bar. If condonation appears in the testimony, although not pleaded, no divorce will be granted.³⁵

³⁴ Appendix, Forms, Nos. 59, 60, 61, 62; Pastoret v. Pastoret, 6 Mass. 276.

³⁵ North v. North, 5 Mass. 330.

CHAPTER XIII.

DEFENSES — CONNIVANCE.

SECTION.

- 117. Connivance Denied.
- 118. Connivance a Bar.
- 119. Passive Acquiescence.
- 120. Corrupt Intention.
- 121. Procurement.
- 122. Connivance at One Act.
- 123. Connivance a Question of Fact.
- 124. No Statutes Respecting Connivance.
- 125. Pleading Connivance.

117. Connivance Defined.

Connivance is the corrupt consent of a married party to that conduct of the other of which complaint is afterwards made. It bars the right of divorce because no injury is received; for what a person has consented to, he cannot set up as an injury.

118. Connivance a Bar.

It is the well established rule, that if either spouse consents to conduct on the part of the other which would constitute a ground for divorce, such party will be precluded from obtaining a divorce therefor.¹ Connivance on the part of the husband will bar him from obtaining relief on account of the adultery which he has allowed to take place. *Volenti non fit injuria* is the principle upon which the rule has been founded.²

119. Passive Acquiescence.

It is not always necessary to show active procurement of the wrongful act. Passive and permissive conduct is sufficient, and is as much a bar as active conspiracy.³ Actual corruption is not necessary to constitute connivance; passive acquiescence, with the intention and

¹ *Morrison v. Morrison*, 136 Mass. 310; *Id.*, 142 Mass. 361; *Pierce v. Pierce*, 3 Pick. 299; *Robbins v. Robbins*, 140 Mass. 528; *Forster v. Forster*, 1 Hag. Con. 146; *Rogers v. Rogers*, 3 Hag. Ecc. 57; *Anichini v. Anichini*, 2 Curt. Ecc. 210.

² *Rogers v. Rogers*, 3 Hag. Ecc. 57; *Phillips v. Phillips*, 1 Rob. Ecc. 144-161.

³ *Moorsom v. Moorsom*, 3 Hag. Ecc. 107; *Morrison v. Morrison*, 136 Mass. 310; *Cairns v. Cairns*, 109 Mass. 408; *Boulting v. Boulting*, 3 Swab. & T. 329.

in the expectation that guilt will follow, is sufficient; but, on the other hand, there must be consent, not mere negligence, inattention, overconfidence, indifference, or dullness of apprehension. It must be intentional concurrence in order to amount to a bar.⁴

It is not necessary to show knowledge of the actual commission of adultery; such extreme negligence to the conduct of his wife, and such encouragement of acquaintance and familiar intimacy as are likely to lead to adulterous intercourse, are sufficient.⁵ The notoriously debauched character of the paramour, his exclusion from all respectable female society, the introduction of him by the husband to his wife, the encouragement of their intimacy, the allowing her to accept a supply of money from him, expostulations from her family at such intimacy, the refusal of the husband to attend to them, and improper familiarities and liberties in his presence, and without his remonstrance, are material in establishing a plea of connivance. The facts when taken separately may be trifling, but together are convincing.⁶

If it is proved that there has been a long course of criminal conduct on the part of the wife, of which the husband was cognizant, or was presumed to have known, he will not be entitled to relief.⁷ The conduct of the husband after being informed of the adultery of his wife, his refusal to interfere with her, or to institute proceedings against her for a divorce, or his long delay in so doing, may not in themselves be connivance, but may be evidence of it. A total indifference to such adultery may lead to the inference of original consent. If there was consent there was no injury, and the husband cannot ask for relief where he has not been injured. The character of the connivance under some circumstances may be so open, gross, and revolting, that the court may find that no injury has been done the husband, and that therefore there is nothing to redress; that the husband has entirely abandoned all right to claim that his wife should be chaste, and that he has thus consented to her prior adultery. He may come before the court with such impure hands that upon the soundest considerations of public policy his divorce should be refused. The

⁴ *Rogers v. Rogers*, 3 Hag. Ecc. 57; *Boulting v. Boulting*, 3 Swab. & T. 329.

⁵ *Gilpin v. Gilpin*, 3 Hag. Ec. 150.

⁶ *Moorsom v. Moorsom*, 3 Hag. Ec. 87.

⁷ *Crewe v. Crewe*, 3 Hag. Ecc. 123.

circumstances of the connivance may be of such a character, having no connection or relation with the prior adultery, as not to operate as a bar against the right of the husband to relief.⁸

120. Corrupt Intention.

Evidence that a husband, from the time when he first became suspicious of his wife's infidelity, was willing in his own mind that she should commit adultery, provided that he could thereby obtain a divorce, and that he expected that she would commit adultery, and that he should obtain proof of it, and thus be enabled to procure a divorce, together with evidence that after his suspicions of her infidelity were aroused he frequently retired, leaving her alone with her suspected paramour, having previously arranged to have them watched by a detective, allowed her to go alone with such suspected person into the streets of the city where they lived, and also on pleasure excursions, and permitted him to use undue familiarity with her in his presence, without disapproval by him, will warrant a finding of connivance on the part of the husband which will bar a libel for divorce filed by him for her adultery.⁹

A corrupt intention is necessary to constitute connivance. The reasonable foundation of the rule, that connivance prevents the libellant from maintaining his libel for adultery, is that he has consented to the adultery, although it may be by a consent unexpected and unknown to the libellee. This consent must necessarily often be inferred from circumstances, but the fact must be found that the libellant either desired and intended, or at least was willing, that the libellee should commit adultery, before the libellant can be said to have connived at it. There is a manifest distinction between the desire and intent of a husband that his wife, whom he believes to be chaste, should commit adultery, and his desire and intent to obtain evidence against his wife, whom he believes already to have committed adultery and to persist in her adulterous practices whenever she has opportunity.¹⁰

Merely suffering in a single case a wife whom he already suspects of having been guilty of adultery to avail herself to the full extent

⁸ *Morrison v. Morrison*, 142 Mass. 361.

⁹ *Morrison v. Morrison*, 136 Mass. 310.

¹⁰ *Robbins v. Robbins*, 140 Mass. 528.

of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife whom he suspects of adultery, in order to obtain proof of that fact. He may do it with the hope and purpose of getting a divorce if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed.¹¹

The law does not compel a husband to remain always bound to a wife whom he suspects, and it allows him, as it does other parties who think they are being wronged, reasonable scope in their efforts to discover whether the suspected party is or is not guilty, without themselves being adjudged guilty of conniving at the crime which they are seeking to detect.¹²

A husband, suspecting his wife of having committed adultery with a man then lodging in his house, requested his son to telegraph him to come to another town the next day. The next day the telegram arrived, and the husband informed his wife of its arrival; that he must go to such other town; that he should probably not return that night, and that if he did he should not return until late; but in pursuance of an interview with counsel, he secretly made arrangements to be driven to his house that evening. Between half-past eight and nine o'clock the husband drove with a witness to his house. He arrived before the lights downstairs were put out, and drove round a square and then came back. At about nine the lights downstairs were put out; soon afterwards the light in the wife's room was extinguished, and from what was seen in the lodger's room the husband was led to suppose that his wife had entered it. He at once entered the house secretly, with the witness, went upstairs, and found his wife and the lodger in bed together. This particular act of adultery would not have happened but for the scheme of the husband. It was

¹¹ *Timmings v. Timmings*, 3 Hag. Ecc. 76; *Stone v. Stone*, 1 Rob. Ecc. 99-101; *Phillips v. Phillips*, 10 Jur. 829; *Wilson v. Wilson*, 154 Mass. 194; *Harris v. Harris*, 2 Hag. Ecc. 376.

¹² *Robbins v. Robbins*, 140 Mass. 528-531; *Wilson v. Wilson*, 154 Mass. 194.

held that the conduct of the husband did not, as matter of law, amount to connivance, and that the judge before whom the case was heard having found, as a fact, that there was no corrupt intent on the husband's part that his wife should commit adultery, or assent to it, he was entitled to a divorce.¹³

121. Procurement.

A divorce will not be granted for adultery of the wife committed through the husband's procurement, although he had suspicions that his wife had been guilty of other offenses.¹⁴

122. Connivance at One Act.

Connivance by a husband at an act of adultery, committed by his wife with one person, on the ground of which a libel for divorce filed by him is dismissed, is not an absolute bar to a libel for divorce for a prior act of adultery committed by her with another person, and not known to the husband at the time he brought the former libel.¹⁵

123. Question of Fact.

Whether certain conduct amounts to connivance or not is a question of fact for the jury to decide under instructions, when it is a jury case.¹⁶ If at the trial of a libel for a divorce on the ground of adultery the jury find that the libellant connived at the adultery, a decree of divorce cannot be entered, although the presiding judge is of opinion that the evidence did not warrant the finding.¹⁷ But since divorce causes are no longer tried by jury¹⁸ connivance is a question of fact for the single justice who tries the case to determine. His decision on a question of fact in matters of divorce cannot be revised by the full court. If there is evidence from which the inference of connivance may fairly be drawn, his finding of such connivance will not be revised upon a report of the case.¹⁹

¹³ *Robbins v. Robbins*, 140 Mass. 528; followed in *Reiersen v. Reiersen*, 52 N. Y. App. Div. 509.

¹⁴ *Pierce v. Pierce*, 3 Pick. 299; *Hedden v. Hedden*, 21 N. J. Eq. 61; *Gower v. Gower*, L. R. 2 P. & D. 428.

¹⁵ *Morrison v. Morrison*, 142 Mass. 361; *Woodward v. Woodward*, 41 N. J. Eq. 224.

¹⁶ *Cairns v. Cairns*, 109 Mass. 408.

¹⁷ *Cairns v. Cairns*, 109 Mass. 408.

¹⁸ St. 1877, ch. 148, sec. 4.

¹⁹ *Jamaica Pond Aqueduct Corporation v. Chandler*, 9 Allen, 159, 166; *Sparhawk v. Sparhawk*, 120 Mass. 390; *Morrison v. Morrison*, 136 Mass. 310.

124. No Statutes Respecting Connivance.

The statutes contain no provision respecting connivance, and the court has assumed that the legislature intended to adopt the general principles which had governed the ecclesiastical courts of England in granting divorces from bed and board, so far as those principles are applicable and are found to be reasonable. This assumption does not go so far as to embrace the recent statute law of England in relation to divorce.²⁰

125. Pleading Connivance.

Connivance must be specially pleaded. A plea of connivance does not necessarily admit adultery, and may be pleaded consistently with a denial of guilt.²¹

²⁰ Robbins v. Robbins, 140 Mass. 528; Morrison v. Morrison, 142 Mass. 363; Pratt v. Pratt, 157 Mass. 506.

²¹ Rogers v. Rogers, 3 Hag. Ec. 57; Moorsom v. Moorsom, 3 Hag. Ec. 87; Appendix, Form No. 67.

CHAPTER XIV.

DEFENSES — COLLUSION.

SECTION.

- 126. Collusion Defined.
- 127. No Statutes Respecting Collusion.
- 128. Suspicious Agreements.
- 129. No Conspiracy, No Collusion.
- 130. Decree Voidable, Not Void.
- 131. Volente Non Fit Injuria.
- 132. Proof of Collusion.

126. Collusion Defined.

Collusion is any agreement between husband and wife to obtain a divorce by an imposition on the court. It may be effected by suppression of the facts or by the introduction of false or fabricated testimony, and is ground for refusing relief.

Collusion is an agreement between the parties for one to commit or appear to commit a matrimonial offense in order that the other may obtain a remedy at law as for a real injury. There is no real injury where there is a common agreement between the parties to effect their object by fraud in a court of justice. If such conduct were permissible it would authorize parties to violate their marriage vows, and would encourage profligate and dissolute manners. The law, therefore, requires that there should be no coöperation for such a purpose, and does not grant a remedy where the adultery or other offense was committed with any such view.¹

127. No Statutes Respecting Collusion.

The statutes contain no provision respecting collusion, and there are no decisions on the subject. Accordingly, it is to be assumed that the legislature intended to adopt the general principles of the English ecclesiastical law in so far as they are applicable and reasonable.²

128. Suspicious Agreements.

A divorce will be refused if it appears that there is collusion

¹ Crewe v. Crewe, 3 Hag. Ecc. 123.

² Morrison v. Morrison, 142 Mass. 363; Robbins v. Robbins, 140 Mass. 528; Pratt v. Pratt, 157 Mass. 506.

between the parties, although there may be a valid cause for the divorce. Any agreement between husband and wife by which they are to endeavor to obtain a divorce by imposing upon the court is collusion, within the meaning of this rule. It must appear that the parties have made an agreement and are acting in concert for the purpose of facilitating a divorce.³

It is clearly collusion for the parties to agree that one of them shall institute a suit for divorce for a cause which does not exist, although they may have some other ground; ⁴ to agree to suppress facts which are pertinent and material; ⁵ or to institute a suit for divorce in pursuance of an understanding whereby one of them has committed some offense, such as adultery, for the purpose of affording ground for a divorce.⁶

Money Promised.

The husband may make the wife a reasonable allowance during the pendency of the libel in order to save the expense of an application for alimony. If the agreement is not confined strictly to alimony, but is broader in its terms, and its tendency is to interest the husband in procuring a divorce or in foregoing resistance to an effort by the wife to that end, then it is contrary to public policy.⁷

129. No Conspiracy, No Collusion.

It is not collusion for a party to take advantage of a matrimonial offense, though it was committed with the hope and expectation that application would be made for a divorce. In other words, the fact that one party commits an offense, such as adultery or desertion, for the purpose of affording grounds for divorce, does not bar the other's right to a divorce, if he did not act in concert with the guilty party.⁸

³ Gray v. Gray, 2 Sw. & T. 554.

⁴ Jessop v. Jessop, 2 Sw. & T. 301; Butler v. Butler, 15 Prob. Div. 13-32-66.

⁵ Brigham, Petitioner, 176 Mass. 223; Barnes v. Barnes, L. R. 1 Prob. & Div. 505; Hunt v. Hunt, 47 Law J. Prob. & Adm. 22; Jessop v. Jessop, 2 Sw. & T. 301; Churchward v. Churchward, 11 Reports, 626.

⁶ Todd v. Todd, L. R. 1 Prob. & Div. 121; Crewe v. Crewe, 3 Hag. Ecc. 123.

⁷ Barnes v. Barnes, L. R. 1 P. & D. 505.

⁸ Crewe v. Crewe, 3 Hag. Ecc. 123; Shaw v. Gould, L. R. 3 H. L. 55; Utterton v. Tewsh, Ferg. Con. 23; Kibblewhite v. Rowland, Id. 226.

130. Decree Voidable, not Void.

Collusion does not make the decree void, as is sufficiently shown by the fact that legal proceedings must be instituted to set it aside.⁹ Action on the part of the court is necessary to annul the decree, and such action the court will not take of its own motion.¹⁰

131. Volente Non Fit Injuria.

A party to a fraud whereby a decree is obtained cannot maintain proceedings to set it aside. If a divorce has been obtained through collusion, the guilty parties are bound by it, on the principle, *volente non fit injuria*. There is no redress for them, and in the absence of fraud or duress they must abide by the shameless bargain they have made. "If both parties colluded in the cheat upon the court, it was never known that either of them could vacate the judgment."¹¹

Long Delay.

Assuming that a petition to set aside a decree of divorce for adultery of the petitioner, brought against the executor of the petitioner's husband, ever could be maintained on the ground of the suppression of evidence by the fraud and collusion of the husband with the petitioner, if her collusion is caused by duress, threats, violence, and pecuniary temptation, her unreasonable delay in bringing the petition puts an end to her rights.¹²

132. The Proof.

Collusion will not be presumed, but must be proved by evidence that is clear and strong, or sufficient facts and circumstances must appear from which it may be affirmatively inferred. It cannot be assumed on mere suspicion. It must be specially pleaded in order to be available in defense.¹³

⁹ *Greene v. Greene*, 2 Gray, 361; *Thomas v. Beals*, 154 Mass. 51, 53; *Miltimore v. Miltimore*, 40 Penn. St. 151, 155.

¹⁰ *Brigham, Petitioner*, 176 Mass. 223, 227.

¹¹ *Wills, C. J.*, in *Prudam v. Phillips*, cited in *Greene v. Greene*, 2 Gray, 362; *Brigham, Petitioner*, 176 Mass. 227, 228.

¹² *Brigham, Petitioner*, 176 Mass. 223.

¹³ Appendix, Forms 68 and 69.

CHAPTER XV.

DEFENSES — RECRIMINATION.

SECTION.

- 133. Recrimination Defined.
- 134. Its General Scope.
- 135. No Statutes Respecting Recrimination.
- 136. Counter Charge of Different Offense.
- 137. Comparison of Mutual Guilt.
- 138. Subsequent Adultery in Amended Answer.
- 139. Libellant's Misconduct.
- 140. Conduct Condoned.
- 141. Pleading — Suit in Counter Charge.

133. Recrimination Defined.

Recrimination is a counter charge that the libellant has been guilty of an offense constituting a cause for divorce. Any matrimonial offense within the meaning of the statute is a complete bar to a divorce when duly pleaded, but if condoned, it is not available in recrimination.

134. Recrimination Generally.

The doctrine of recrimination in divorce cases rests upon the principle that a person shall not be permitted to complain of a breach of a contract which he has himself violated, or of an injury, when he is open to a charge of the same nature; that he who has violated his marriage vow should be deprived of his remedy of divorce, although his wife is unfaithful. It logically follows that proof of any statutory cause for divorce, uncondoned, is a complete defense. This is but an application of the maxim of equity, that he who asks relief must come into court with clean hands. A proper administration of justice does not require that courts shall occupy their time and the time of people who are so unfortunate as to be witnesses of the misdoings of others in giving equitable relief to parties who have no equities. Divorce laws are made to give relief to the innocent, not to the guilty.¹

135. No Statutes Respecting Recrimination.

The statutes have merely prescribed the grounds of divorce, and

¹ *Morrison v. Morrison*, 142 Mass. 361; 2 Greenl. Ev. sec. 52; *Whippen v. Whippen*, 147 Mass. 295.

have made no provision respecting recrimination. Accordingly, the court assumes that the legislature intended to adopt the general principles which had governed the ecclesiastical courts in England in granting divorces from bed and board, so far as these principles are applicable and are found to be reasonable.²

136. Counter Charge of Different Offense.

In the English ecclesiastical courts adultery was the only conduct on the part of the complainant that could be set up in recrimination to defeat his right to a divorce. Accordingly, cruelty was not a bar in recrimination, because it was not the same kind of offense.³ But in this commonwealth recrimination, as a bar to a divorce, is not limited to a charge of the same nature as that alleged in the libel. The statutes enumerate various causes, either of which will equally entitle the aggrieved party to an absolute divorce. Adultery, and, under certain circumstances defined in the statutes, intoxication, desertion, cruelty, refusal to support, conviction of a crime and sentence to a long term of imprisonment, are all treated as being of the same nature and same grade of delinquency; each is a ground for divorce, and a married person who has been guilty of either, so as to be liable to proceedings for a divorce by reason thereof, cannot obtain a divorce against the other for committing the same offense, or one or all of the rest of the list.⁴ It is sufficient if the recrimination charges any of the causes for divorce so declared in the statute. The general principle which governs in a case where one party recriminates is that recrimination must allege a cause which the law declares sufficient for a divorce.⁵ In other words, whatever may be the ground alleged and relied upon, the defendant may set up by way of recrimination any conduct on the part of the complainant which the statute declares a ground for divorce; as, for instance, desertion or cruelty or drunkenness, in a suit for divorce on the ground of adultery, and vice

² *Morrison v. Morrison*, 142 Mass. 361; *Robbins v. Robbins*, 140 Mass. 523; *Pratt v. Pratt*, 157 Mass. 506.

³ *Cocksedge v. Cocksedge*, 1 Rob. Ecc. 90; *Harris v. Harris*, 2 Hagg. Ecc. 376-411; *Clapp v. Clapp*, 97 Mass. 531; *Hall v. Hall*, 4 Allen, 39.

⁴ *Handy v. Handy*, 124 Mass. 394 and cases cited; *Cumming v. Cumming*, 135 Mass. 386.

⁵ *Morrison v. Morrison*, 142 Mass. 361.

versa; or cruelty in a suit for divorce on the ground of desertion, and vice versa.⁶

A husband cannot maintain a libel for divorce against his wife for her adultery committed after his sentence to imprisonment at hard labor in the state prison for a term of five years or more. Such a sentence is classed with adultery and other causes which are grounds for a divorce from the bond of matrimony. A person who has been so sentenced has been guilty of an offense of the same class and degree, under the divorce act, as one who has committed adultery. As soon as the libellant has been so sentenced the right of his wife to apply for an absolute divorce is complete, and he will not be entitled to a divorce for her subsequent adultery.⁷

A husband cannot set up the wife's desertion in bar of her libel for his adultery committed before her desertion had continued so long as to give him a right to a divorce. The desertion not having continued three years, the libellant had a *locus penitentiae*, but after the adultery was under no obligation to return.⁸ So, also, a husband cannot maintain a libel for his wife's adultery and desertion if it appears that he himself committed adultery before her desertion was complete.⁹

Where a wife deserted a husband so that he would be entitled to a divorce against her on that ground, she cannot maintain a libel against him for his adultery after her desertion was complete, but she may maintain it if he has committed adultery within the three years and before her desertion continued for the full statutory period. This doctrine stands on the obviously just ground that a party guilty of a breach of the marriage vow should not have the assistance of the court to enforce any marital right.¹⁰

137. Comparison of Mutual Guilt.

One act of adultery is sufficient to bar the libellant, although the

⁶ Hall v. Hall, 4 Allen, 39; Clapp v. Clapp, 97 Mass. 531; Handy v. Handy, 124 Mass. 394; Cumming v. Cumming, 135 Mass. 386; Morrison v. Morrison, 142 Mass. 361.

⁷ Handy v. Handy, 124 Mass. 394; Adams v. Adams, 2 C. E. Green, 324.

⁸ Walker v. Walker, 172 Mass. 82.

⁹ Clapp v. Clapp, 97 Mass. 531.

¹⁰ Clapp v. Clapp, 97 Mass. 531; Hall v. Hall, 4 Allen, 39; Hope v. Hope, 1 Sw. & T. 107.

libellee may have been guilty of many such offenses,¹¹ and it is immaterial which was prior in point of time.¹²

138. Subsequent Adultery in Amended Answer.

The fact that the libellant has committed adultery since the institution of proceedings for a divorce is a bar in recrimination, and may be set up in a cross libel or amended answer in the nature of a plea puis darrein continuance.¹³

139. Libellant's Misconduct.

Misconduct of the libellant in connection with the offense which is alleged as a cause for divorce, such as conduct provoking the cruelty or causing the desertion in question, is a complete defense, although not sufficient to amount to a cause for divorce in favor of the libellee, or to constitute a valid plea in recrimination.¹⁴

140. Conduct Condoned.

In England, by statute, the courts are given a discretionary power to refuse a divorce on the ground of adultery if the complainant has been guilty of adultery during the marriage; and some of the judges, in the exercise of this discretion, have refused a divorce on the ground of adultery because of adultery by the complainant which the defendant had condoned.¹⁵

In the leading and most carefully considered case on this subject the court declined to follow the English decisions. "While it is true that in some cases more exact justice might be done between the parties by the exercise of such discretion, it is better that such authority should be conferred by the legislature, if it deems it expedient, than that it should be assumed by the court. We are more inclined to deal with the question as one of principle, and to seek for the general rule by which this case, and other cases presenting similar facts, should be governed. Condonation restores equality before the law. If the injured party is willing to forgive the offense the law

¹¹ *Astley v. Astley*, 1 Hag. Ecc. 714.

¹² *Proctor v. Proctor*, 2 Hag. Con. 202; *Brisco v. Brisco*, 2 Add. Ecc. 259.

¹³ *Brisco v. Brisco*, 2 Add. Ecc. 259; *Smith v. Smith*, 4 Paige, 432; *Strong v. Strong*, 28 How. Pr. 432; *Fuller v. Fuller*, 41 N. J. Eq. 198.

¹⁴ *Watts v. Watts*, 160 Mass. 468; *Lyster v. Lyster*, 111 Mass. 327. See criticism in 1 Bish. Mar. Div. & Sep. sec. 1753.

¹⁵ *Goode v. Goode*, 2 Sw. & T. 253; *Seller v. Seller*, 1 Sw. & T. 482.

may well give full effect to that forgiveness, and not extend to such party the temptation, the encouragement, the license to run through the whole calendar of matrimonial offenses without redress at the hands of the other party. An act of adultery committed by the husband, and forgiven for years, should not be held to compel the husband to submit without redress to the faithlessness and unrestrained profligacy of his wife. The penalty is too severe for a forgiven offense. It is better to hold that when the erring party is received back and forgiven, the marriage contract is renewed, and begins *res integra*, and that it is for the party, and not for the courts, to forgive the new offense."¹⁶ An offense, when it is condoned, ceases to be a ground for a divorce, and for this reason, if for no other, it is not available in recrimination.¹⁷

141. Pleading — Recrimination Must Be Specially Pleaded.

Upon a libel for a divorce for the cause of adultery, if the libellee would show a like crime committed by the libellant, to prevent the divorce, he must plead it specially, or he will not be permitted to show it in evidence.¹⁸ The answer must allege the facts which are to be proved in order that the opposite party may have notice of the charge and prepare to repel it, if possible. Even in those states where the chancery practice obtains, if there is no plea, and the bill is taken *pro confesso*, evidence of recrimination has been adjudged inadmissible at the hearing before the master to whom the case was referred to report his findings.¹⁹ The plea of recrimination is practically a "set-off of equal guilt."²⁰

Person, Time, Place.

Recrimination should be alleged in the answer with all the particularity required in the libel, and it must be proved just as if it were an original charge. The name of the *particeps criminis*, if known, should be stated in the answer; if unknown, it should be so averred.

¹⁶ *Cumming v. Cumming*, 135 Mass. 386.

¹⁷ *Cumming v. Cumming*, *supra*; *Anichini v. Anichini*, 2 Curt. Ecc. 210; *Jones v. Jones*, 18 N. J. Eq. 33; *Masten v. Masten*, 15 N. H. 159.

¹⁸ *Pastoret v. Pastoret*, 6 Mass. 276; *Smith v. Smith*, 4 Paige, 432; *Jones v. Jones*, 3 C. E. Green. 33; Appendix. Forms No. 63, 64, 65, 66.

¹⁹ *Johnson v. Johnson*, 14 Wend. 637.

²⁰ *Beeby v. Beeby*, 1 Hagg. Ecc. 789, 790.

The time and place of the commission of the offense should be pleaded with reasonable certainty.

Guilt of Libellee Not Admitted.

The allegation in an answer that the libellant has committed the same offense as that charged against the libellee is not admissible in evidence as an admission of guilt on the part of the libellee. The pleadings are not evidence on the trial, but allegations only whereby the party making them is bound. The statements in the pleadings are simply to raise issues.²¹

Suit on Counter-Charge.

If the defense to a wife's libel for desertion is adultery, which is not proved at the trial, a decree nisi granted in her favor will be a bar to a subsequent libel for such adultery as was originally pleaded in recrimination. The decree nisi necessarily involved an adjudication that she was not guilty of any act of adultery before the filing of her libel. The result would have been the same if the alleged adultery was known to the libellee, and was not pleaded in defense; if known and not pleaded, it is waived.²²

²¹ Turner v. Turner, 3 Greenl. 398; Lyons v. Ward, 124 Mass. 364; R. L. ch. 173, sec. 85.

²² Edgerly v. Edgerly, 112 Mass. 53; Bartlett v. Bartlett, 113 Mass. 312.

CHAPTER XVI.

ANNULLING AND AFFIRMING THE MARRIAGE.

SECTION.

142. Annulling the Marriage.
143. Divorce and Nullity Suits Distinguished.
144. Fraud or Other Cause.
145. Pregnancy at the Time of Marriage.
146. Mutual Commerce before Marriage.
147. Antenuptial Incontinence.
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149. Evading Statute by Marrying in Another State.
150. Duress.
151. Illegal Arrest.
152. Both Parties Must be Alive when the Marriage is Annulled.
153. Marriage of the Guilty Party.
154. Marriage Void by Reason of Former Marriage.
155. Equity has no Jurisdiction.
156. Parties Competent Witnesses.
157. Affirming the Marriage.

142. Annulling the Marriage.

When the validity of a marriage is doubted for fraud, duress or other cause, either party may file a libel for annulling such marriage.

The marriage will be annulled, —

- (a) If the wife at the time of the marriage is pregnant, but not if the husband himself had sexual intercourse with her before marriage, although he could not have been the father of the child.

Antenuptial incontinence, in the absence of pregnancy at the time of marriage, is not such a fraud upon the marital rights of the parties as will warrant a decree of nullity.

- (b) If either party at the time of the marriage was afflicted with an incurable venereal disease, such as syphilis in its constitutional stages.
- (c) If both parties resident here have their marriage solemnized in another jurisdiction for the express purpose of evading the laws of this commonwealth, and afterwards return and reside here.
- (d) If a man is illegally arrested without a warrant on the charge of bastardy or seduction and to avoid

imprisonment goes through the form of marriage, and then leaves his wife; but it is otherwise if the arrest was in due form.

- (e) A libel for annulling the marriage cannot be maintained by the survivor after the death of the other party.

143. Divorce and Nullity Suits Distinguished.

Suits to annul a marriage must be distinguished from suits for a divorce. A suit for a divorce presupposes the existence of a valid marriage, and a decree of divorce annuls existing rights; but a suit for nullity proceeds upon the theory that there is no valid marriage at all, and a decree of nullity declares that rights supposed to have arisen from the attempted marriage never in fact existed. A decree of divorce annuls a marriage only from the time it is entered, while a decree of nullity, unless a contrary rule is established by statute, annuls the marriage *ab initio*, and, in effect, declares that there never has been any marriage. The rights of property as between the parties when the marriage is annulled are unaffected by the nominal marriage. The woman is not entitled to alimony or dower, and the man is barred from curtesy or any claim upon her personal property.¹

144. Fraud or Other Cause.

The statutes formerly provided that when a marriage is supposed to be void, or the validity is doubted, "for fraud or other cause," either party may file a libel for annulling the same. The omission of the words, "for fraud or other cause," contained in those statutes,² does not change the meaning of subsequent statutes, which assume that there may be marriages which are legal in form, but invalid in fact.³

Misrepresentation and Deceit.

It is quite obvious, from the terms in which the statute is expressed, that it was founded on the assumption that a marriage, into which one of the parties was induced to enter through the fraud and decep-

¹ R. L. ch. 151, sec. 11; P. S. 145, sec. 11; Gen. Sts. 107, sec. 4; St. 1855, ch. 27; St. 1846, ch. 197; R. S. 76, sec. 3; St. 1785, ch. 69.

² Gen. Sts. 107, sec. 4; St. 1855, ch. 27.

³ *Smith v. Smith*, 171 Mass. 405.

tion of the other, is null and void, and, like other contracts, may be annulled and set aside by the defrauded party. The statute does not provide that fraud shall vitiate a contract of marriage, but only confers an authority on the court to decree a dissolution of the marriage for such cause, as in other cases of nullity. Nor does it define or in any way prescribe the nature of the fraud, or the degree or amount of deception which shall be deemed to be sufficient to warrant the court in adjudging the contract to be void. This is left to be determined on general principles applicable to all contracts, subject only to such restrictions and modifications as necessarily arise and grow out of the peculiar nature of the marriage contract. Indeed, it would be difficult, if not impossible, to lay down any general rule or definition which would comprehend all cases coming within the range of the legal import of the word fraud. A learned writer terms fraud *hydra multorum capitum*. An inquiry into the fraudulent intent and conduct of parties necessarily involves an investigation of facts: and as no two cases are precisely alike in their circumstances, it follows that the question whether fraud exists sufficient to vitiate a contract always depends very much on the nature of the transactions, the means of information possessed by the parties, and their relative situation and condition towards each other.⁴

It is sufficient to prove that a reasonably cautious and prudent person might be misled or deceived as to the existence of a particular fact which formed the basis or contributed an essential ingredient in the contract, and that these acts and conduct were adapted and designed to induce and create a false impression and belief in the mind of the other party. Every intentional misrepresentation of a material fact, however caused, whether it is the result of express statements or is to be implied from circumstances, if made with a view to induce another person to become a party to a contract which he would not otherwise have entered into, affords sufficient ground to absolve the innocent party from the obligation which he was fraudulently led to assume. It is therefore not necessary to show that there were any express misrepresentations or any positive acts of concealment.⁵

Whenever fraud is relied on as the ground of invalidating a con-

⁴ Reynolds v. Reynolds, 3 Allen, 605.

⁵ Donovan v. Donovan, 9 Allen, 140.

tract, it is material not only to prove false and fraudulent representations, but also that they were made under such circumstances as to lead to a reasonable inference that a party was thereby deceived and induced to enter into the contract he seeks to avoid. If it appears that he had the means of ascertaining the falsity of the statements made to him, or that the nature of the transaction and the circumstances attending it were such as to put a reasonable person on inquiry, the presumption of deceit arising from proof of the fraud will be repelled, and the party will be left to bear the consequences of his own want of due diligence and caution.⁶

145. Pregnancy at the Time of Marriage.

A woman who has not only submitted to the embraces of another man, but who also bears in her womb the fruit of such illicit intercourse, has, during the period of her gestation, incapacitated herself from making and executing a valid contract of marriage with a man who takes her as a wife in ignorance of her condition, and on the faith of representations that she is chaste and virtuous. In such a case the concealment and false statement go directly to the essentials of the marriage contract, and operate as a fraud of the gravest character on him with whom she enters into that relation.

The superior court has power to declare a marriage void into which a man was induced to enter by confiding in the representations of the woman that she was chaste, when in fact she was with child by another man, if her husband repudiated her as soon as he had reason to know the fact.⁷

146. Mutual Commerce before Marriage.

If a man marries a woman whom he knows to be with child, and with whom he himself has had unlawful intercourse, being induced to marry her by assurances that the child is his, and not taking any

⁶ *Foss v. Foss*, 12 Allen, 26. See *Scroggins v. Scroggins*, 14 N. C. (3 Dev.) 535.

⁷ R. L. ch. 151, sec. 11; *Reynolds v. Reynolds*, *supra*; *Morris v. Morris*, Wright, 630; *Baker v. Baker*, 13 Cal. 87; *Carris v. Carris*, 9 C. E. Green, 516; *Allen's Appeal*, 99 Pa. St. 196; *Ritter v. Ritter*, 5 Blackf. 81; *Frith v. Frith*, 18 Ga. 273; *Scott v. Shufeldt*, 5 Paige, 43; *Harrison v. Harrison*, 94 Mich. 559. See *Montgomery v. Montgomery*, 3 Barb. Ch. 132; *Long v. Long*, 77 N. C. 304. See Appendix, Forms No. 47, 48, and 49 with note.

See *Moss v. Moss*, (1897) P. D. 276, for criticism of the reasoning in *Reynolds v. Reynolds*, *supra*.

further steps to ascertain its paternity nor suspecting her unchastity with any other man than himself, the marriage will not be declared void, although it appears that he could not have been the father of the child.⁸

If a man marries a woman whom he knows to be unchaste, having had sexual intercourse with her, the marriage will not be declared void for the reason that she, on the day thereof, being at the time pregnant with a bastard child of which he was not the father, assured him she was not pregnant, and he married her on the faith of that assurance. A libellant who has had sexual intercourse with his prospective wife is regarded as having full knowledge that she was unchaste before he entered into the marriage contract, and was thereby put on his guard so that he cannot allege that he was induced to contract the marriage by such fraud and deceit on her part as will enable him to avoid the contract.⁹

If a man marries a woman with whom he has had sexual intercourse, believing her representation that she is pregnant, he cannot have the marriage annulled for fraud, although her statements are subsequently found to be untrue.¹⁰

147. Antenuptial Incontinence.

It is generally accepted law that antenuptial incontinence of either party will not warrant a decree of divorce or nullity. As mere incontinence in a woman prior to her entrance into the marriage contract, not resulting in pregnancy, does not necessarily prevent her from being a faithful wife, or from bearing to her husband the pure offspring of his loins, there seems to be no sufficient reason for holding misrepresentations or concealment on the subject of chastity to be such a fraud as to afford a valid ground for declaring a consummated marriage void. Even if a woman has been a common prostitute and has reformed, the marriage will be binding, although she concealed

⁸ *Foss v. Foss*, 12 Allen, 26; *Seilheimer v. Seilheimer*, 13 Stewart, N. J. 482; *Bartholomew v. Bartholomew*, 14 Pa. Co. Ct. R. 230. See also *Frith v. Frith*, 18 Ga. 273.

⁹ *Crehore v. Crehore*, 97 Mass. 330; *Foss v. Foss*, 12 Allen, 26; *States v. States*, 37 N. J. Eq. 195 (10 Stew.); *Allen's Appeal*, 99 Pa. St. 196, 44 Am. Rep. 101; *Todd v. Todd*, 149 Pa. St. 60, 17 L. R. A. 320, 24 Atl. 128; *Todd v. Todd*, 24 Wkly. Notes Cas. 31; *Hoffman v. Hoffman*, 30 Pa. St. (6 Casey) 417.

¹⁰ *Hoffman v. Hoffman*, 30 Pa. St. 417.

her former misconduct. The law presumes from the fact of marriage that the woman has abandoned unlawful pleasures.¹¹

A woman's concealment from her intended husband of the fact that she had been the mother of an illegitimate child has been held not to be a ground for divorce or of nullity of marriage.¹²

A woman whose husband, by whom she had a child, had procured a divorce from her in another state, became a bona fide resident of this commonwealth, where she became pregnant by another man. In a conversation between them respecting marriage, she represented to him that she was unmarried; that she had never been married; that she had never before been in the family way, and that she had never had sexual intercourse with any one but him. She gave birth to a child, of which he acknowledged the paternity, and afterwards they were married here. Subsequently he learned of the earlier marriage, and that the offspring was living, but upon being told that the first husband had died before her second marriage he continued to cohabit with her. Later, upon learning that the first husband was living and had been divorced from his wife, he ceased to cohabit with her, and brought a libel for a sentence of nullity of the marriage, which was dismissed upon the ground that no such fraud had been practiced upon him as to entitle him to a decree.¹³ The libellant knew, at the time these representations were made, that she was unchaste, as he had had connection with her himself, and was thereby put upon his guard; and this would be so even if her prior sexual intercourse had been illicit.¹⁴

148. Venereal Disease.

It is within the power of a judge of the superior court to enter a decree for a libellant declaring the marriage void where it appears that the libellant, soon after the ceremony, and before the consum-

¹¹ *Donnelly v. Strong*, 175 Mass. 157; *Smith v. Smith*, 171 Mass. 407; *Reynolds v. Reynolds*, 3 Allen, 605; *Baker v. Baker*, 13 Cal. 87; *Hedden v. Hedden*, 6 C. E. Green, 61; *Leavitt v. Leavitt*, 13 Mich. 452-458; *Best v. Best*, 1 Add. Ec. 411; 2 Eng. Ec. 158; *Reeves v. Reeves*, 2 Phillim. 125; 1 Eng. Ec. 208, 209; *Wier v. Still*, 31 Iowa, 107; *Farr v. Farr*, 2 McArthur, 35.

¹² *Farr v. Farr*, 2 MacArthur, 35; *Smith v. Smith*, 8 Or. 100; *Leavitt v. Leavitt*, 13 Mich. 452. See dictum in *Donnelly v. Strong*, 175 Mass. 159.

¹³ *Donnelly v. Strong*, 175 Mass. 157.

¹⁴ *Donnelly v. Strong*, *supra*; *Foss v. Foss*, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass. 330; *Smith v. Smith*, 171 Mass. 404; *Reynolds v. Reynolds*, 3 Allen, 605.

mation of the marriage, on learning that the respondent was afflicted with a venereal disease, refused to live with and never did live with him, and the judge finds that he was constitutionally afflicted with syphilis, with which the libellant would become infected in case of cohabitation, and "that the disease would be transmitted to any offspring which they might have; that while it was not absolutely incurable, the chances of a cure being effected in the state in which the respondent was were very remote and doubtful."

The court did not intimate that the concealed existence of a venereal disease in one of the parties to a marriage will ordinarily be a sufficient ground for a decree of nullity. The disease in most cases is presumably curable, in which event the marriage would undoubtedly not be annulled.¹⁵

The same rule by parity of reasoning applies to the case of a woman who was afflicted with chronic syphilis at the time of the marriage.¹⁶

149. Evading the Statutes by Marrying in Another State.

When persons resident in this commonwealth, in order to evade the provisions of certain statutes as to prohibited marriages,¹⁷ and with an intention of returning to reside in this commonwealth, go into another state or country, and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this commonwealth, and may be set aside by a sentence of nullity,¹⁸ but in order to warrant such a decree both parties must have intended to evade the provisions of the statute.¹⁹

150. Duress.

A man lawfully arrested for bastardy or seduction cannot, if he marries the woman to procure his release, have the marriage annulled for duress; his being under arrest as the putative father of a bastard child is not enough to avoid the contract.²⁰ It is the same where one marries a woman he has seduced through fear of the penal conse-

¹⁵ *Smith v. Smith*, 171 Mass. 404; *Vondal v. Vondal*, 175 Mass. 383. See Appendix, Form No. 47; *Crane v. Crane*, (N. J.) 49 Atl. Rep. 734.

¹⁶ *Ryder v. Ryder*, 66 Vt. 158; 28 Atl. 1029; 44 Am. St. Rep. 833.

¹⁷ R. L. ch. 152, sec. 21; R. L. ch. 151, sec. 4.

¹⁸ *Tyler v. Tyler*, 170 Mass. 151.

¹⁹ *Whippen v. Whippen*, 171 Mass. 560; *Com. v. Lane*, 113 Mass. 458. See Appendix, Form No. 56 and note.

²⁰ *Jackson v. Winne*, 7 Wend. 47; *Sickles v. Carson*, 11 C. E. Green, 440.

quences.²¹ The fact that he had a good defense, and might have defended successfully, makes no difference.²²

151. Illegal Arrest.

But if a man illegally arrested without a warrant on the charge of bastardy, to avoid imprisonment, goes through the form of marriage, and then leaves his wife, such marriage will be annulled for fraud and duress. The precise question arose before a single judge in the supreme judicial court, May Term, 1861, in the case of *Abram A. James v. Julia B. Smith*. The parties were paupers of the towns of Bridgewater and Raynham. The petitioner alleged that he was unlawfully arrested by a deputy sheriff for the county of Plymouth, at the instance of two of the selectmen of Raynham, and taken to the office of George W. Bryant, Esq., a magistrate within and for the county of Plymouth, and thence to the house of said Julia B., where the marriage ceremony was performed by said Bryant; that at the time of his arrest the officer had no warrant or precept whatever, nor during the time he was in the custody of the officer; that the selectmen threatened to confine him in jail, to imprison and deprive him of his liberty, if he refused to marry said Julia B., or pay to them the sum of five hundred dollars, all of which threats were made during the time he was held in close custody by the selectmen and deputy sheriff; that being unable to pay said sum of money, and through fear of being deprived of his liberty, and while surrounded by the deputy sheriff and his associates, he consented to marry said Julia B., and under these circumstances, and while still continuing in the custody of the deputy sheriff and his associates, the marriage ceremony was performed; that immediately after the ceremony he left the said Julia B., and never at any time after had connection with her. The cause of making the arrest was that the said Julia B. had, some weeks previously, been delivered of a bastard child, which she alleged and swore at the trial to be the child of the petitioner, though she never made any complaint before a magistrate nor had any warrant ever issued according to law. The petitioner denied that he was the father of the child. The case was tried before Judge Dewey. The facts as they appeared in evidence were substantially those alleged in the

²¹ *Honnett v. Honnett*, 33 Ark. 156, 34 Am. R. 39.

²² *Scott v. Shufeldt*, 5 Paige, 43.

petition. The court found that the marriage was procured by duress and illegal restraint, and ordered that the pretended marriage be declared void.²³

152. Both Parties Must be Alive When the Marriage is Annulled.

If two persons contract marriage in good faith, in the belief that each can lawfully marry, and it is subsequently discovered that the marriage is void because one of the parties has a former husband or wife alive, a libel for annulling the marriage cannot be maintained by the survivor after the death of the other party. The statute plainly contemplates proceedings between the original parties to the marriage, and these can only be had while they are both alive.²⁴ It has always been held in England that petitions for a decree of nullity of a marriage cannot be maintained after the death of one of the parties.²⁵

While both parties are living, and the marriage apparently in force, it may be important to have their status determined by an adjudication, rather than that they should remain in doubt in regard to the validity of the marriage. But where death terminates the marriage relation, this reason no longer exists. Moreover, there are grave objections to permitting one of the parties, after the death of the other, to have a decree which shall relate back and change their previous apparent status, and perhaps affect important collateral interests. Without an express provision of statute to that effect, such a libel will not be maintained after the death of either of the parties.²⁶ It is very clear that divorce proceedings generally are ended by the death of a party. They are conspicuous examples of those personal actions which die with the person. To state the same result from a different point of view, an executor does not represent his testator for the purposes of a matrimonial cause.²⁷

²³ 1 Bishop on Mar. Div. & Sep. sec. 544 and note.

²⁴ Rawson v. Rawson, 156 Mass. 578; P. S. ch. 145, sec. 11; R. L. ch. 151, sec. 11; R. L. ch. 151, sec. 5.

²⁵ Brownsword v. Edwards, 2 Ves. Sen. 243, 245; Hinks v. Harris, 4 Mod. 182; Hemming v. Price, 12 Mod. 432.

²⁶ Rawson v. Rawson, 156 Mass. 578; Brigham, Petitioner, 176 Mass. 223.

²⁷ Stanhope v. Stanhope, 11 P. D. 103; Brigham, Petitioner, 176 Mass. 223, 226.

153. Marriage of Guilty Party.

Formerly the party from whom a divorce had been obtained was prohibited from marrying again during the life of the other party.²⁸ But the supreme judicial court, upon petition filed by the guilty party, might authorize such party to marry again, on proving good conduct, except when the divorce was granted for adultery.²⁹

If the party against whom the divorce was granted married without leave of court, during the life of the other party, and afterwards obtained such leave, a continued cohabitation in the belief that the marriage solemnized was, or had become, legal, would not render it so. The solemnization of the second marriage gave it no validity, and the cohabitation between the parties was unlawful in the beginning, and could only become lawful upon a new solemnization of matrimony after the husband had obtained leave to marry again. Such a marriage is void, and may be annulled.³⁰

The party against whom a divorce has been granted is now prohibited from marrying within two years from the time of the entry of the final decree of divorce, but at the expiration of that period such party may marry without petition to the court.³¹

154. Marriage Void by Reason of Former Marriage.

A marriage entered into by the parties in good faith, and with a full but erroneous belief of the death of the woman's real husband, is void, although he has been absent for seven years, and she has not known that he was alive; and may be declared void by a sentence of nullity. As the husband was in fact still living, and the first marriage had not been dissolved by a decree of divorce, the respondent was in law his wife, her second marriage was unlawful, and the information which both parties to it had of the former marriage, and of the circumstances connected with the absence of the former husband, will not estop either to apply to the court for a decree of nullity.³²

²⁸ G. S. ch. 102, sec. 25.

²⁹ G. S. ch. 107, sec. 26; St. 1873, ch. 371, sec. 4; *Thompson v. Thompson*, 114 Mass. 566; *Cochrane, Petitioner*, 10 Allen. 276; *Sparhawk v. Sparhawk*, 114 Mass. 355; *Com. v. Lane*, 113 Mass. 458-471.

³⁰ *Thompson v. Thompson*, 114 Mass. 566.

³¹ St. 1881, ch. 234; P. S. ch. 146, sec. 22; R. L. ch. 152, sec. 21.

³² *Glass v. Glass*, 114 Mass. 563; *Williamson v. Parisien*, 1 Johns. Ch. 389; *Miles v. Chilton*, 1 Rob. Eccl. 684.

Legitimacy of Issue in Such Cases.

If a marriage is declared void by reason of a prior marriage of either party, and it appears that the second marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, that fact shall be stated in the decree, and the issue of the second marriage, born or begotten before the second marriage was declared void, shall be the legitimate issue of the parent capable of contracting the marriage.³³

155. A Court of Chancery Has no Jurisdiction.

It does not fall within the general jurisdiction of a court of chancery, independently of statutory authority, to annul a marriage for the reason that, when it was contracted, the wife had a former husband living; and there is no presumption that such a court of another state had jurisdiction to entertain a suit of that nature, or in such suit to pass an order for the payment of alimony pendente lite, or to enter a final judgment for arrears of alimony, counsel fees, and costs; but the existence of the jurisdiction must be proved at the trial of a suit here to obtain an execution upon the judgment.³⁴

156. Parties Competent Witnesses.

The parties to a libel for a sentence of nullity of marriage are competent witnesses.³⁵ A libel to annul the marriage is brought under statutes which apply equally to libels for divorce. It is, therefore, in a strict and proper sense, a divorce suit in which a party is made a competent witness for himself or the other party to the proceedings, except that neither husband nor wife shall be allowed to testify as to private conversations with each other.³⁶

157. Affirming the Marriage.

When the validity of a marriage is denied or doubted by either party, the other party may file a libel for affirming the same.

A libel for affirming a marriage may be filed in the same manner as a libel for divorce, and all statutory provisions relative to divorce

³³ R. L. ch. 151, sec. 14; St. 1902, ch. 310.

³⁴ Kelley v. Kelley, 161 Mass. 111.

³⁵ Foss v. Foss, 12 Allen, 26; R. L. ch. 175, sec. 20.

³⁶ Dexter v. Booth, 2 Allen, 559; Fuller v. Fuller, 177 Mass. 184; R. L. ch. 175, sec. 20, cl. 1; R. L. ch. 151, sec. 11.

causes, so far as applicable, apply thereto. Upon proof of the validity of the marriage it will be affirmed by a decree of the court, which will be conclusive upon all persons concerned.³⁷

Certain marriages are deemed legal and will be affirmed upon proper proceedings, as where a marriage contract has been entered into with due legal ceremony and the parties thereafter live together as husband and wife; and where at the time of such marriage ceremony a former husband or wife of one of the parties was living, and the former marriage with such person was still in force; and where such subsequent marriage contract was entered into by at least one of the parties in good faith, in the full belief that the former husband or wife was dead, or that such former marriage had been annulled by divorce; or without knowledge on the part of one of them of such former marriage; and where the impediment to such subsequent marriage existing by reason of the former marriage is removed by the death of the other party to the former marriage, or by a proper decree of divorce, and the parties to such subsequent marriage then continue living together as husband and wife in good faith, on the part of at least one of them, they shall be taken and deemed to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be deemed to be the legitimate issue of both parents.³⁸

At the hearing on a libel brought under the provisions of Pub. Sts., ch. 145, sec. 11, and St. 1895, ch. 427, for the affirmation of a contract of marriage into which the libellant had entered with knowledge that within two years thereof a decree of divorce from a former wife had been granted against the libellee, it cannot be said that a request by the libellant for a ruling, as matter of law, that the libel should be granted, was improperly refused by the presiding judge.³⁹

³⁷ R. L. ch. 151, sec. 11; P. S. ch. 145, sec. 11; G. S. ch. 107, sec. 5; R. S. ch. 76, sec. 4.

³⁸ St. 1895, ch. 427; St. 1896, ch. 499; R. L. ch. 151, sec. 6; *Tyler v. Tyler*, 170 Mass. 150; *Whippen v. Whippen*, 171 Mass. 560; *Littlefield v. Littlefield*, 174 Mass. 216.

³⁹ *Littlefield v. Littlefield*, 174 Mass. 216.

CHAPTER XVII.

FOREIGN DIVORCES.

SECTION.

158. Foreign Divorces in General.

159. Each State Retains the Power to Regulate Marriage and Divorce.

160. Law of Domicil.

161. Jurisdiction in Divorce Causes is Special in its Nature.

162. Injunction Against Divorce Proceedings in Another Jurisdiction and *Lis Pendens*.

158. Foreign Divorces in General.

A divorce decreed in another state or county according to the laws thereof, and by a court having jurisdiction of the cause and of both the parties, is valid in this commonwealth; but when an inhabitant of this commonwealth goes into another state or county to obtain a divorce for a cause which occurred here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained is of no force or effect in this commonwealth.

159. Each State Retains the Power to Regulate Marriage and Divorce.

Every state has an undoubted right to determine the matrimonial status, or social condition, of the persons domiciled within its territory; except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed upon them, by the constitution of the United States.¹ No control over the subject of marriage and divorce has been conferred by the constitution upon the national government, but each state retains the power to regulate the grounds of divorce, and the jurisdiction to grant divorces, between those having their domicil within its territory.²

160. Law of the Domicil.

The appropriate law by which the dissolubility of a marriage is to be determined is that of the actual domicil. It is, therefore, no breach of comity between states to refuse to recognize as valid and

¹ *Strader v. Graham*, 10 How. 82, 93.

² *Hopkins v. Hopkins*, 3 Mass. 158.

binding on our own citizens a divorce obtained in another state in violation of our laws, even though its validity cannot be questioned except in this state. Such refusal is not a violation of the constitution of the United States providing that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."³ This clause prevents the judgment of a court of another state, having jurisdiction of the cause and of the parties, from being impeached for fraud, or on any other ground.⁴ But when, for any reason, the court has no jurisdiction, its judgment is void, and the recital in its record of the facts necessary to give jurisdiction is not conclusive.⁵

It is competent, therefore, to show that a decree of divorce granted by a court of another state, although appearing on its face to be valid, is in fact void, because the libellant fraudulently, and in evasion of the law of his own domicile, procured that court to exercise jurisdiction over the case. A party, or one collaterally affected by the judgment, may show that the court had no jurisdiction. Parol evidence is admissible to prove want of jurisdiction notwithstanding the recitals in the record.⁶ A judgment of a court in another state is not entitled to full faith and credit under the constitution and laws of the United States unless the court had jurisdiction of the parties as well as of the cause.⁷

When the validity of a divorce obtained in another state or country is questioned, the principal considerations involved are: (1) Did

³ Art. 4, sec. 1.

⁴ *Christmas v. Russell*, 5 Wall. 290; *Maxwell v. Stewart*, 22 Wall. 77.

⁵ *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas, Light & Coke Co.*, 19 Wall. 58; *Carleton v. Bickford*, 13 Gray, 591; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 273; *Bell v. Bell*, 181 U. S. 175; *Andrews v. Andrews*, 176 Mass. 92, 94.

⁶ *Bissell v. Briggs*, 9 Mass. 462; *Hall v. Williams*, 6 Pick. 232; *Gleason v. Dodd*, 4 Met. 333; *Carleton v. Bickford*, 13 Gray, 591; *Odom v. Denny*, 16 Gray, 114, 115; *Ever v. Coffin*, 1 Cush. 23; *Shannon v. Shannon*, 4 Allen, 134; *Finneran v. Leonard*, 7 Allen, 54, 55; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 273; *Sewall v. Sewall*, 122 Mass. 156, 161; *Cumington v. Belchertown*, 149 Mass. 223, 225; *Adams v. Adams*, 154 Mass. 290, 294; *Andrews v. Andrews*, 176 Mass. 92, 94; *Leith v. Leith*, 39 N. H. 20; *Frothingham v. Barnes*, 9 R. I. 474; *Hoffman v. Hoffman*, 46 N. Y. 30; *Shumway v. Stillman*, 6 Wend. 447; *D'Arcy v. Ketchum*, 11 How. 165; *Christmas v. Russell*, 5 Wall. 290; *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas Light & Coke Co.*, 19 Wall. 58; 1 Greenl. Ev. secs. 540 to 550; *Cooley Con. Lim.* (6th ed.) 493 to 501; *Story Conf. Law* (8th ed.) p. 275 to 314.

⁷ *Gleason v. Dodd*, 4 Met. 333; *D'Arcy v. Ketchum*, 11 How. 165.

the libellant, when an inhabitant of this state, go into another state with a fraudulent intention to evade the law; that is, for the purpose of obtaining a divorce for any cause occurring here, and while the parties resided here? (2) Was the divorce granted for any cause which would not authorize a divorce by the laws of this state? (3) Was there an actual change of domicile?

A decree of divorce a vinculo obtained in another state, between parties residing in this state, and at the suit of a party who went into that state for the purpose of obtaining it, is void in this state even if the other party appeared and answered to the suit.⁸ Even before the Revised Statutes, which went into operation on May 1, 1836, such a decree, upon general principles of justice and policy, would not have been valid, but void, partly on the ground that it was a proceeding in fraud of our law, and partly because the court of the foreign state could have no jurisdiction of the subject-matter and of both the parties.⁹

Evidence that a wife went into another state and immediately, while she and her husband still resided in this state, applied for and obtained a divorce a vinculo for causes which would not be causes of divorce in this state, warrants the inference that she went into that state in order to obtain a divorce.¹⁰

It has been held frequently that the fact that a man abandons his wife and goes into another state, and then applies for a divorce soon after he is able to do so, warrants the inference that he goes there for that purpose.¹¹ Chief Justice Shaw has said that the presumption arising from such a fact is "violent, if not conclusive."¹²

⁸ R. L. ch. 152, sec. 35; *Chase v. Chase*, 6 Gray, 157; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Bell v. Bell*, 181 U. S. 175; *Sewall v. Sewall*, 122 Mass. 156; *Hanover v. Turner*, 14 Mass. 227; *Clark v. Clark*, 8 Cush. 385; *Lyon v. Lyon*, 2 Gray, 367; *Smith v. Smith*, 13 Gray, 209; and *Ditson v. Ditson*, 4 R. I. 87, 93, commenting on *Barber v. Root*, 10 Mass. 227; *Hanover v. Turner*, 14 Mass. 227; *Harteau v. Harteau*, 15 Pick. 181, and *Lyon v. Lyon*, 2 Gray, 367. As to effect of appearance by nonresident to give jurisdiction, see *Ellis' Appeal* (Minn.), 23 L. R. A. 287, and note.

⁹ *Barber v. Root*, 10 Mass. 260; *Hanover v. Turner*, 14 Mass. 227 (1817); *Harteau v. Harteau*, 14 Pick. 181; *Lyon v. Lyon*, 2 Gray, 367; *Chase v. Chase*, 6 Gray, 157; *Jackson v. Jackson*, 1 Johns. 424.

¹⁰ *Lyon v. Lyon*, 2 Gray, 367; *Chase v. Chase*, 6 Gray, 157; *Smith v. Smith*, 13 Gray, 209; *Dickinson v. Dickinson*, 167 Mass. 474.

¹¹ *Streitwolf v. Streitwolf*, 181 U. S. 179.

¹² *Smith v. Smith*, 13 Gray, 209; *Sewall v. Sewall*, 122 Mass. 156.

Evidence that a husband, whose marriage in this commonwealth was compulsory, never lived with his wife, except that he staid with her over night a few times shortly after the marriage, and never did anything for her support, and that about a year afterwards, without saying anything to her about going away, he went into another state, where, soon after he was able to do so under its laws, he applied for and subsequently obtained a divorce from her, and during the following year returned to his former home here and continued to reside here, will warrant a finding, at the hearing of a libel for divorce by her on the ground of his desertion, that he went to such other state for the purpose of obtaining his divorce for a cause which occurred here while the parties resided here, intending to return here to live after it was obtained; and will justify the entry of a decree in her favor.¹³

A decree of divorce a vinculo, between parties in this state, obtained in another state, for a cause which occurred here, and which was not a legal cause of divorce here, and at the suit of a party who went into that state for the purpose of obtaining it, is void, and cannot be set up in defense to a libel for divorce filed by the same party in this state,¹⁴ or to an indictment for adultery, because of a subsequent marriage and cohabitation.¹⁵

It is no defense to a wife's libel for divorce to prove that a divorce has already been granted in another state on the application of the husband; if it is proved that he was not a citizen of the state in which the divorce was granted, but went there from this commonwealth, of which he was a citizen, for the purpose of obtaining it, while she remained in Massachusetts, and did obtain it fraudulently. In such case the decree of the court granting the divorce is not conclusive evidence of his citizenship. For the purpose of proving that a husband, who has obtained a divorce on the ground of desertion, in another state, was not a citizen thereof, but went there from this commonwealth, of which he was a citizen, for the purpose of obtaining it, while his wife remained here, and did obtain it fraudulently, evidence is competent to prove by records that before leaving this

¹³ *Dickinson v. Dickinson*, 167 Mass. 474.

¹⁴ *Smith v. Smith*, 13 Gray, 209; *Sewall v. Sewall*, 122 Mass. 156; *Dickinson v. Dickinson*, 167 Mass. 474.

¹⁵ *Com. v. Kendall*, 162 Mass. 221; *Com. v. Blood*, 97 Mass. 538.

commonwealth he twice instituted libels for divorce against her which were not sustained, and that he was compelled to pay and did pay the amount of a judgment against him for her board, for a part of the time during which, in his libel, the divorce was granted, he alleged that she deserted him.¹⁶

The fact that a marriage has taken place in another state, on the faith of a previous divorce there, does not preclude an inquiry by the courts of this state into the validity of the divorce, or a denial of the validity of the marriage, if the divorce is one that would be decreed void if it were directly in issue. A testator, resident in this state, made a bequest to the "present wife" of his brother, "for the benefit of herself and all the children" of such brother. The brother subsequently went to California and obtained a divorce before residing there the required time, although the record of divorce proceedings recited that he had done so, and afterwards married there a woman by whom he had an illegitimate son. It was held on a bill in equity by such son to establish his rights under the will, that the validity of the divorce might be inquired into, notwithstanding the recitals in the record; that the marriage was void, and did not legitimate the plaintiff, and that the plaintiff was not entitled to take under the will.¹⁷

161. Jurisdiction in Causes of Divorce is Special in Its Nature.

Jurisdiction over the subject of divorce is a special authority not recognized by the common law, and the proceedings in relation to it stand on the same footing with those of limited and inferior jurisdiction; so that its powers in the case must be shown and appear to have been strictly pursued.¹⁸ There is no presumption, therefore, that a court of record in another state has jurisdiction to grant a divorce in a case where no service of process upon the libellee appears to have been made.¹⁹ The party setting up such a judgment must show affirmatively that the court had jurisdiction of both parties.²⁰

A presumption may exist in favor of the jurisdiction of a court of record of another state which has assumed to exercise jurisdiction

¹⁶ *Shannon v. Shannon*, 4 Allen, 134.

¹⁷ *Adams v. Adams*, 154 Mass. 290.

¹⁸ *Commonwealth v. Blood*, 97 Mass. 538.

¹⁹ *Commonwealth v. Blood*, 97 Mass. 538.

²⁰ *Barringer v. King*, 5 Gray, 11.

over a subject-matter in controversy between parties residing there.²¹ But there is no such presumption in favor of the jurisdiction of such a court over parties not there residing. An *ex parte* divorce, granted in a state never visited by the respondent, and without notice or special appearance, is invalid.²² If both parties were inhabitants of this commonwealth at the time the divorce was granted by a foreign tribunal, and neither of them was ever in the state where the divorce was obtained, the court granting it will have no jurisdiction of the parties, and the decree will be wholly void.²³

The reality of the new residence and of the change of domicile is a question of great importance. If no new domicile was acquired the foreign court would have no jurisdiction, and its decree of divorce would be a mere nullity.²⁴ A voting list of a town, without evidence that a person's name was placed thereon at his request, and a tax list with a memorandum of "paid" against his name, are inadmissible to show that his domicile was in that town.²⁵ If it is found as a fact that the party did not leave the state to obtain a divorce the divorce will be upheld.²⁶

A divorce obtained in Illinois by a citizen thereof for the cause of desertion, upon notice by publication in a newspaper in the manner prescribed by the statutes of that state, is valid, although the wife was then living in Massachusetts under an agreement by which, after reciting their separation, he promised to pay her a certain weekly sum as long as she should remain single, and although she had no actual notice of his proceedings for a divorce, and was not in Illinois during the pendency thereof; and it is not competent for her, in a libel for divorce brought by her in this commonwealth, to offer evi-

²¹ *Buffum v. Stimpson*, 5 Allen, 591.

²² *Lyon v. Lyon*, 2 Gray, 367; *Brett v. Brett*, 5 Met. 233; *Borden v. Fitch*, 15 Johns. 121.

²³ *Chase v. Chase*, 6 Gray, 157; *Smith v. Smith*, 13 Gray, 209; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; *Sewall v. Sewall*, 122 Mass. 156; *Hardy v. Smith*, 136 Mass. 328.

²⁴ *Burlen v. Shannon*, 115 Mass. 438; *Sewall v. Sewall*, 122 Mass. 156; *Ross v. Ross*, 129 Mass. 243; *Cumington v. Belchertown*, 149 Mass. 223; *Dickinson v. Dickinson*, 167 Mass. 474; *Winship v. Winship*, 1 C. E. Green, 107; *Briggs v. Briggs*, 5 Prob. Div. 163.

²⁵ *Sewall v. Sewall*, 122 Mass. 156.

²⁶ *Loker v. Gerald*, 157 Mass. 42; 16 L. R. A. 497 and note; *Cheever v. Wilson*, 9 Wall. 108, 123; *Hood v. Hood*, 110 Mass. 463; *Burlen v. Shannon*, 115 Mass. 438.

dence that he obtained the decree of divorce there by fraud, and upon facts which would not entitle him to a divorce here. It also appeared that both parties had removed from Massachusetts to Illinois, and lived there together as husband and wife for three or four years, when the wife returned to Massachusetts and remained there up to the time of filing her libel. The court said that the respondent continued to be a citizen of Illinois, and the domicile of the husband was in law the domicile of the wife. The mere fact of her residence in this commonwealth, separate from her husband, whether with or without his consent, had no tendency to establish a change of domicile. The fact of desertion was conclusively settled between the parties by the judgment in Illinois; and it was not competent for her, on the trial of a libel for divorce against him in this state, to contradict that judgment.²⁷

Actual notice of proceedings for divorce in a court of a state which has always been the domicile of the plaintiff, and the only matrimonial domicile need not be given a non-resident defendant, if reasonable efforts to give actual notice are required by the statutes of the state, and are actually made.²⁸ But no valid divorce can be decreed on constructive service by courts of a state in which neither party is domiciled.²⁹

A wife, who has appeared in a suit for divorce brought by her husband against her in another state, in which a decree is rendered in his favor, and who subsequently executes a release reciting the divorce therein obtained, and for a pecuniary consideration discharging all her claims against him and his estate, cannot, after his subsequent marriage and cohabitation with another woman, maintain a libel for divorce therefor against him in this state, on the ground that the court in the other state had no jurisdiction of his libel, without proving that he went to that state for the purpose of procuring a divorce.³⁰

A decree of divorce obtained in Vermont at the suit of the wife, although the marriage was contracted in this state, will be upheld if the parties at the time of the divorce had their domicile in Vermont.³¹

²⁷ Hood v. Hood, 11 Allen, 196.

²⁸ Atherton v. Atherton, 181 U. S. 155; Ditson v. Ditson, 4 R. I. 87.

²⁹ Bell v. Bell, 181 U. S. 175; Streitwolf v. Streitwolf, 181 U. S. 179.

³⁰ Loud v. Loud, 129 Mass. 14.

³¹ Barber v. Root, 10 Mass. 260.

The *lex loci* by which the conduct of married persons is to be regulated, and their relative duties are to be determined, and by which the relation itself is to be annulled, must be always referred, not to the place where the contract was entered into, but where it subsists for the time, where the parties have had their domicile, and have been protected in the rights resulting from the marriage contract, and especially where the parties are, or have been, amenable for any violation of the duties incumbent upon them in that relation.³²

A divorce obtained by the husband in another state, in accordance with the statutes of that state, for desertion of the wife, who lived here, where the parties were married and resided until his removal to the other state, which was not for the purpose of obtaining the divorce, will be valid here, it appearing that the wife was duly served with process here, in accordance with the statutes of the other state, and it not appearing that she separated from her husband for justifiable cause.³³

If the foreign court has jurisdiction of the cause and the parties, thereby rendering the divorce legal and operative elsewhere, a person against whom a divorce has been obtained for adultery in another state, by the law of which both parties may marry again, may contract a valid marriage in this commonwealth without obtaining the leave of court formerly provided for by the Gen. St. 107, sec. 26, and the St. 1864, ch. 216.³⁴

162. Injunction Against Divorce Proceedings in Another Jurisdiction.

The attempt to stop a divorce suit in another state by injunction is decidedly unusual, but not unprecedented. One of the best established grounds for such a remedy is an attempt to evade domestic laws, which has been held by some courts to be amply sufficient to sustain an injunction against a divorce suit brought in another state for the purpose of evading the laws of the plaintiff's true domicile.³⁵ The court will not enjoin a suit pending in another state although it

³² *Barker v. Root*, 10 Mass. 260.

³³ *Loker v. Gerald*, 157 Mass. 42; 16 L. R. A. 497; *Cheely v. Clayton*, 110 U. S. 701.

³⁴ *Bullock v. Bullock*, 122 Mass. 3.

³⁵ *Kittle v. Kittle*, 8 Daly, 72. See authorities in note to *Thorndike v. Thorndike*, (Ill.) 21 L. R. A. 71.

is between citizens resident within its own jurisdiction, solely on the ground that the decisions of the tribunals of such state may differ from its own.³⁶

The pendency of a prior suit in personam, in a foreign court, between the same parties, for the same cause of action,³⁷ or the pendency of such a suit in another state, is not a bar to a like suit in this state.³⁸ Consequently the pendency of divorce proceedings in another state is not in law a bar to a suit here.³⁹

³⁶ Carson v. Dunham, 149 Mass. 52.

³⁷ McHenry v. Lewis, 21 C. D. 202; Scott v. Lord Seymour, 1 H. & C. 219; Cox v. Mitchell, 7 C. B., N. S., 55.

³⁸ Stanton v. Embrey, 93 Mass. 548; Miner Litho. Company v. Wagner, 177 Mass. 404.

³⁹ Miner Litho. Company v. Wagner, 177 Mass. 404.

CHAPTER XVIII.

CUSTODY AND SUPPORT OF CHILDREN.

SECTION.

- 163. Custody of Children.
- 164. At Common Law and in Equity.
- 165. Under the Statute.
- 166. Custody of Children of Void Marriage.
- 167. Rights of the Parents.
- 168. Foreign Divorces.
- 169. Habeas Corpus.
- 170. Federal Courts have no Jurisdiction.
- 171. Support of Children.
- 172. Modification of Decree.
- 173. Liability to Third Persons.

163. Custody of Children.

The court, in the exercise of a sound judicial discretion, having regard to the welfare and permanent good of the child as a predominant consideration, will determine to whose custody he shall be committed. The rights of the parents, in the absence of misconduct, are equal, and the happiness and interest of the child determine such custody or possession.

164. At Common Law and In Equity.

The common law regards the father as the natural guardian of his children, and recognizes his right to their custody. Formerly his right was held to be so much superior to that of the mother that when she had separated herself from him on the alleged ground of ill treatment, and taken with her their infant child, then at the breast, it was brought into court on habeas corpus and delivered to the father, though he was an alien, or was living in illicit intercourse with another woman, unless she could make it appear that he intended to abuse his right.¹

By St. 2 and 3 Vict., ch. 54, the rights of the mother are now better provided for. But before that statute the courts of chancery in England were accustomed to disregard the strict legal rights of the father to the custody of the children whenever the welfare or interests

¹ The King v. De Manneville, 5 East. 221; The King v. Greenhill, 4 Ad. & El. 624; Dumain v. Gwynne, 10 Allen, 271.

of the children required it. In some instances they have taken his children from him and placed them in the custody of strangers. They have regarded the welfare of the child as paramount to the rights of the father or mother. In this country our courts of law, while adopting the legal principle that the father is usually entitled to the custody of his children, have been inclined to modify it by adopting the equitable principle that this right must yield to considerations affecting the welfare of the children, and by regarding more highly the rights of the mother.²

165. Under the Statute.

Upon a decree of divorce, or upon petition at any time after such decree, the superior court may make such decree as it considers expedient relative to the care and custody of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain; and afterward may from time to time, upon the petition of either parent, revise and alter such decree or make a new decree, as the circumstances of the parents and the benefit of the children may require.³

If the parents of minor children live separately, the probate court has the same power, upon the petition of either parent, to make decrees relative to their care, custody, education and maintenance, as in the case of children whose parents are divorced; and may determine which of the parents of such children shall be entitled to such custody in accordance with the law relative to the custody of children whose parents have been divorced.⁴

166. Custody of Children of Void Marriages.

Upon or after a decree of nullity the court has similar power to make orders relative to the care, custody and maintenance of minor children of the parties as upon a decree of divorce.⁵

167. Rights of the Parents.

The rights of the parents, in the absence of misconduct, are equal, and the happiness and welfare of the children determines the custody

² *Com. v. Briggs*, 16 Pick. 203; *Pool v. Gott*, 14 Law Reports, 269; *State v. Smith*, 6 Greenl. 462; *Mercein v. The People*, 25 Wend. 102.

³ R. L. ch. 152, sec. 25; Appendix, Forms No. 8, 9, 10.

⁴ R. L. ch. 153, sec. 37.

⁵ R. L. ch. 151, sec. 15.

or possession. The statute regards the happiness and welfare of the children as being much more important than the legal rights of either parent.⁶

The General Rule.

The party not in fault is usually given the custody of the minor children. Yet this is not an imperative rule, and the court in its discretion may make a different disposition of them. It has been held that a husband obtaining a divorce from his wife for her bigamy and adultery is not entitled, as matter of law, to the custody of their children of tender years.⁷ But at a subsequent period, when the children have arrived at an age when their morals are likely to be injured by bad example, the court will deliver them to the care of the father.⁸

The court looks into the circumstances of each case, and makes such order as the good of the children requires. It is the benefit and welfare of the infant to which the attention of the court is principally directed. As a necessary result of this principle, it follows that the custody of infant children must always be regulated by judicial discretion exercised with reference to their best interest.

The parent deprived of custody is usually allowed to have access to his child. The time, place and circumstances under which it will be permitted should be stated in the order,⁹ but there have been cases in which the court, in the exercise of a sound discretion, has denied an adulteress all access to her children.¹⁰

168. Foreign Divorce.

If, after a divorce has been decreed in another state or country, minor children of the marriage are inhabitants of this commonwealth, the superior court, upon the petition of either parent or of a next friend in behalf of the children, after notice to both parents, may make like decrees relative to their care, custody, education and maintenance as if the divorce had been decreed in this commonwealth.¹¹

⁶ R. L. ch. 152, sec. 28; *Dumain v. Gwynne*, 10 Allen, 270.

⁷ *Haskell v. Haskell*, 152 Mass. 16; *Com. v. Addicks*, 5 Binn. 520.

⁸ *Com. v. Addicks*, 2 S. & R. 174.

⁹ *Oliver v. Oliver*, 151 Mass. 349; *Symington v. Symington*, L. R. 2 H. L. Sc. 415.

¹⁰ *Clout v. Clout*, 2 Sw. & Tr. 391; *Seddon v. Seddon*, 2 Sw. & Tr. 640.

¹¹ R. L. ch. 152, sec. 26; *Young v. McIntire*, 156 Mass. 27.

Removing Children from the State.

A minor child of divorced parents, who is a native of or has resided five years within this commonwealth, and over whose custody and maintenance the superior court has jurisdiction, shall not, if of suitable age to signify his consent, be removed out of this commonwealth without such consent, or, if under that age, without the consent of both parents, unless the court upon cause shown otherwise orders. The court, upon application of any person in behalf of such child, may require security, and may issue such writs and processes as the case may require.¹²

The appointment in this commonwealth of a guardian over a child whose legal domicile is in another state, and who has a guardian under the laws of that state, does not deprive the court, in its discretion, to decree the custody of the child to the foreign guardian.¹³

169. Habeas Corpus.

If, in the case of an unauthorized separation of a wife and child from her husband, without any apparent justifiable cause, it is not clearly proved that the husband is unfit to have the custody of the child, the court will order it to be restored to him, and a writ of habeas corpus may properly issue against the wife, on the application of the husband, for the purpose of obtaining the custody of their child. The writ of habeas corpus is governed by the judicial discretion of the court, in directing which all the circumstances are to be taken into consideration. In the case of a child of tender years, the good of the child is to be regarded as the predominant consideration. But in general the court will so far interfere as to issue the writ and inquire into the circumstances of the case, in order to prevent a party entitled to the custody of a child from seeking it by force or stratagem.¹⁴ The court, in proceedings in which the care and custody of any child is drawn in question, may issue a writ of habeas corpus when necessary in order to bring before it such child. The writ may be made returnable forthwith, and the court may make any appropriate order or decree relative to the child who may thus be brought before it.¹⁵

¹² R. L. ch. 152, sec. 27.

¹³ Woodworth v. Spring, 4 Allen. 326.

¹⁴ Com. v. Briggs, 16 Pick. 203, 205; Dumain v. Gwynne, 10 Allen, 270.

¹⁵ St. 1902, ch. 324.

170. Federal Courts Have No Jurisdiction.

The whole subject of the domestic relations is regulated entirely by the laws of the several states. The district court of the United States has no jurisdiction to issue a writ of habeas corpus to recover the custody of a child withheld from its parent; nor to order the delivery of the child to its parent; nor to imprison for contempt for disobedience of that order. A proceeding by habeas corpus in the district court, to restore the custody of a child to its parent, is void; and an attempt to enforce its order, in such a case, by imprisonment for contempt, is illegal and void. A person imprisoned for contempt in disobeying the order of such court for the delivery of the child to its parent will be discharged on habeas corpus.¹⁶

171. Support of Children.

A father is not liable for the support of his minor child, after the custody of the child has been given to the mother by a decree of the court.

The right of the father to the services and earnings of his minor children is founded upon the obligation which the law imposes upon him to nurture, support and educate them, and it continues until their maturity, if they remain with him, when the law determines that they are capable of providing for themselves.¹⁷ But when the father is deprived of their custody and services by a decree which commits them to the custody of the mother, the duty to support them no longer exists, except as the court may direct, in pursuance of statutory authority. The father becomes entirely absolved from the common-law obligation to support them. The only obligation which afterwards rests upon him consists of such terms and conditions in respect to alimony and allowances as the court may impose in the decree of divorce or in some subsequent decree in the same proceeding.

If the decree committing the child to the custody of the wife is silent upon the question of maintenance, she will be deemed to have assumed the burden of its support, and to have relinquished all claim upon the father. No contract can be implied against the husband, as he would cease to have control over the child, or any right to make any provision for it, except with the mother's consent.¹⁸

¹⁶ *Ex parte Burrus*, 136 U. S. 586; *Barry v. Mercein*, 42 Fed. Rep. 113.

¹⁷ *Reynolds v. Sweetser*, 15 Gray, 80.

¹⁸ *Hancock v. Merriek*, 10 Cush. 41; *Brow v. Brightman*, 136 Mass. 187; *Brown v. Smith*, 19 R. I. 319; *Hall v. Green*, 87 Me. 122.

172. Modification of Decree.

Jurisdiction over the custody and support of children in divorce cases is a continuing one, and the court may modify or change the original order for custody or maintenance, which is usually "until the further order of the court," whenever circumstances render such change proper. The remedy, therefore, is to apply for a modification of the decree, so as to include such support.¹⁹

173. Liability to Third Persons.

If a wife leaves her husband without justifiable cause, taking their minor child with her, and the husband is able and willing to support the child, and so informs the wife and a third person with whom she places the child, the fact that the father makes no attempt to obtain the custody of the child does not of itself authorize the wife to pledge his credit for necessities furnished to the child by such third person at the request of the wife.²⁰

Where the defendant's minor children were taken from his house without his consent and without any neglect on his part to provide for them, and were boarded by his wife's father during the pendency of a libel by her for a divorce, and the defendant, after the board had been furnished, promised to pay therefor, it was held that the promise was not binding for want of a sufficient consideration. In order that a moral obligation may constitute a valid consideration for an express promise there must have been some preëxisting legal consideration.²¹ But if the wife leaves her husband's house because of his violence and cruelty, and from reasonable apprehension of her safety, he is liable for the board of their child whom she takes with her, if, knowing where the child is, he makes no attempt to reclaim it; and he is not discharged from such liability by his wife's subsequent return to his house.²²

¹⁹ *Burrows v. Purple*, 107 Mass. 428; *Brow v. Brightman*, 136 Mass. 187; *Oliver v. Oliver*, 151 Mass. 349; R. L. ch. 152, sec. 25 and 28.

²⁰ *Baldwin v. Foster*, 138 Mass. 449.

²¹ *Dodge v. Adams*, 19 Pick. 429.

²² *Reynolds v. Sweetser*, 15 Gray, 78.

CHAPTER XIX.

ALIMONY.

SECTION.

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174. Alimony Defined.

Alimony is that proportion of the husband's estate which is judicially allotted to a wife for her support, and necessarily ceases upon the death of either party.

It is called alimony pendente lite when ordered for the wife's support during the pendency of the proceedings, and permanent alimony when allowed after the termination of the suit.

It may be made payable in instalments or in one gross sum, and the decree for alimony may be modified, from time to time, upon the application of either party for cause shown.

175. How Enforced.

The payment of alimony may be enforced :

- (a) By *scire facias* on the decree, but a petition is usually preferable to *scire facias* because the proceeding is more speedy and flexible.
- (b) By an attachment for contempt.
- (c) By execution, which may issue, in the discretion of the court, without notice to the adverse party.
- (d) By any other appropriate process, in the same manner as decrees are enforced in equity.

176. Authority to Grant Alimony is Purely Statutory.

The court is authorized by successive statutes, upon granting to a wife a decree of divorce, to allow her reasonable alimony out of her husband's estate. The authority to grant alimony, like the authority to decree divorces, is confined to the cases expressly enumerated in the statutes.¹ The court may also, upon a divorce, or upon petition at any time after a divorce, decree a part of the wife's estate in the nature of alimony to the husband, but only in the event of a decree of divorce from the bond of matrimony, absolutely and finally severing the marriage tie.² A divorce *nisi* is not such a divorce, but is in the nature of a divorce from bed and board, not absolutely dissolving the bond of matrimony between the parties.³

177. Husband's Faculties.

The amount to be awarded as alimony is within the discretion of the court, having regard to the conduct of both parties, the value of the husband's property and income, the amount of his debts, and all the other circumstances of the case,⁴ or, in the phrase of the English ecclesiastical courts, "the faculties" of the husband at the time, although acquired since the original decree.⁵

The wife, to be entitled to support, must need it, and the husband must be able to furnish it. The allowance must be requisite to

¹ Shannon v. Shannon, 2 Gray, 285; R. L. ch. 152, sec. 30; Kelley v. Kelley, 161 Mass. 112.

² R. L. ch. 152, sec. 30; Garnett v. Garnett, 114 Mass. 347.

³ Graves v. Graves, 108 Mass. 314; Edgerly v. Edgerly, 112 Mass. 53; Garnett v. Garnett, 114 Mass. 347.

⁴ Burrows v. Purple, 107 Mass. 428; Graves v. Graves, 108 Mass. 311; Carter v. Carter, 109 Mass. 306, 309.

⁵ De Blaquiére v. De Blaquiére, 3 Hag. Ecc. 322, 329; Harmar v. Harmar, 32 L. J. N. S. (Prob. & Mart.) 118; Graves v. Graves, 108 Mass. 314, 321.

enable her to sue or defend, and the amount awarded will be limited to the wife's actual needs, until the final decree is entered. All the circumstances of the case will be considered, such as the pecuniary and social condition of the parties, and whether the husband has settled a portion of his estate on his wife, or she has sufficient separate estate of her own.

There is no presumption that the wife is destitute of property because our statutes have given married women the right to acquire and possess property.⁶ Originally alimony pendente lite was allowed almost as a matter of course, because at common law the husband had control over the property of the wife, and unless she received alimony she would be without means to enforce her legal rights.

Pension Money.

Pension money may be considered as part of the husband's estate, rendering him liable for alimony, as it is designed as well for the wife's benefit, and an allowance may be made where pension money is the only means of the husband.⁷

178. Gross Sum or Instalment.

The construction of the statutes has always been that alimony may, in the discretion of the court, be ordered to be paid in one gross sum, or in instalments at stated periods.⁸ It is within the discretion of the court to include in one decree alimony since the filing of the libel, if not already paid, as well as alimony for the future.⁹ And under our practice there is no valid objection to awarding upon the final decree a gross sum in full of all arrears of alimony pending the suit, and of all costs and expenses in the suit, as well of future alimony, and of all expenses of maintaining the children, the custody of whom has been awarded to the wife.¹⁰

179. A Decree for Alimony Makes the Wife a Creditor.

A wife who has obtained a decree for alimony is a creditor within

⁶ R. L. ch. 153, sec. 1.

⁷ Tully v. Tully, 159 Mass. 91.

⁸ Orrok v. Orrok, 1 Mass. 341; Rec. 1805, fol. 114; Livermore v. Boutelle, 11 Gray, 217; Chase v. Chase, 105 Mass. 385; Burrows v. Purple, 107 Mass. 428.

⁹ Burrows v. Purple, 107 Mass. 428, 435; Burr v. Burr, 7 Hill, 207; De Blaquiére v. De Blaquiére, 3 Hagg. Ecc. 322; Wilson v. Wilson, Ib. 329.

¹⁰ Burrows v. Purple, 107 Mass. 428, 435.

the protection of the St. of 13 Eliz., ch. 5, and may impeach a conveyance made by her husband to delay and defraud her. The judgment for alimony creates a debt of record in favor of the wife.¹¹

A conveyance of real estate by a husband after he has committed adultery, though before his wife has filed a libel for divorce, is void, if made to prevent her from recovering such alimony as the court may decree to her.¹² A wife may recover lands which her husband has procured to be sold upon mortgage in order to evade his liabilities to his wife and to deprive her of her dower.¹³

A divorced woman, in whose favor land of her former husband stood attached to secure his payment of alimony to her, filed a bill in equity to redeem it from a mortgage; and four years afterwards, pending her bill, he brought a suit for the same purpose, in which the mortgagee did not appear. It was held that she should be joined in his bill as a defendant, on her own motion; that his right to redeem should be decreed conditional on his payment of the costs of her suit, and limited to thirty days from the date of the decree; and that, if he should not redeem within the time, she should be permitted to prosecute his suit for her own exclusive benefit.¹⁴

180. Modification of Decree.

The court may from time to time, on the petition of either party, revise and alter its decree respecting the amount of alimony and the payment thereof; or, on the petition of a wife who has obtained a decree of divorce, grant alimony, although none was made or asked for on the original libel; and, in either case, make such decree as it might have made in the original suit.¹⁵ Upon an application to alter a decree for alimony the court may take into consideration property acquired by the husband since the original decree, as well as the facts on which that decree was founded and the circumstances of the

¹¹ Chase v. Chase, 105 Mass. 385; Allen v. Allen, 100 Mass. 373 and cases cited; Livermore v. Boutelle, 11 Gray, 217; Knapp v. Knapp, 134 Mass. 353, 355; Burrows v. Purple, 107 Mass. 428, 435; Morrison v. Morrison, 49 N. H. 69.

¹² Livermore v. Boutelle, 11 Gray, 217; Parkman v. Welch, 19 Pick. 231.

¹³ Gilson v. Hutchinson, 120 Mass. 27; Brownell v. Briggs, 173 Mass. 529.

¹⁴ Briggs v. Davis, 108 Mass. 322.

¹⁵ Burrows v. Purple, 107 Mass. 428, 433; Graves v. Graves, 108 Mass. 314, 321; R. L. ch. 152, sec. 33; Foster v. Foster, 130 Mass. 189, 191; Southworth v. Treadwell, 168 Mass. 512.

separation of the parties, and any new facts bearing upon the question.¹⁶

Where it was shown on a petition for an increase of alimony that the wife was afflicted with a disease which required unusual expense, it was held that the increase should be allowed. The court said: "The situation of the petitioner required extraordinary expenses, and if the parties had not been divorced the respondent would have been morally obliged to spend more than his income and to sell part of his estate to pay those expenses, and his improper conduct ought not to excuse him from doing what, by his marriage contract, it would have been his duty to perform."¹⁷

Alimony awarded to the wife by the first decree may be increased without a distinct petition therefor. So, also, when the parties are both before the court upon the question of entering a final decree of divorce, the subject of alimony may be disposed of as an incident of the principal case, and requires no distinct petition.¹⁸

181. Alimony Can Be Decreed Only When Demanded in the Pleadings.

A decree for alimony must be warranted by the allegations of the libel or petition. The court has no jurisdiction to decree property in the form of alimony from one person to another without some allegations bringing that property into litigation. A decree for alimony, under such circumstances, is void, and may be impeached collaterally as having no legal foundation. It would be a forfeiture and confiscation of property rather than the adjudication of a litigated claim. The husband may have good reason for being unwilling to resist a libel for divorce in which there is no prayer for alimony, and he may refuse to answer to the charges of divorce, and is not liable to have his entire property swept from him, perhaps, by a hasty decree, in his absence, without notice of any claim for alimony.¹⁹

¹⁶ *Graves v. Graves*, 108 Mass. 314; *Allen v. Allen*, 100 Mass. 373, 374; *Peckford v. Peckford*, 1 Paige, 274; *Sparhawk v. Sparhawk*, 120 Mass. 390.

¹⁷ *Bursler v. Bursler*, 5 Pick. 427.

¹⁸ *Graves v. Graves*, 108 Mass. 314.

¹⁹ See 4 *Harvard Law Review*, where the subject is considered at some length. *Jordan v. Jordan*, 53 Mich. 550.

182. Costs in Proceedings for Divorce and Alimony.

Upon petitions for alimony, and upon petitions to revise and alter a decree for alimony, the court, in its discretion, may award costs to either party, as justice and equity may require, and accordingly has the power, as incidental to its jurisdiction in such cases, to award costs to the wife against the husband in suits for divorce and on petitions for increase of alimony.²⁰ If no provision is expressly made by law the costs are wholly in the discretion of the court, but no greater sum can be taxed than is allowed for similar charges in actions at common law.²¹

Costs on Discontinuance.

If a husband, to avoid payment of temporary alimony or counsel fees, or for any other cause, voluntarily discontinues a libel against his wife, she will be entitled to a judgment and execution against him for costs.²²

183. Reference to Arbitrator.

The question of the amount to be awarded as alimony may be referred to an arbitrator.

The question of the amount of alimony need not necessarily be heard only by the judge in person, but when he deems it convenient, or the parties desire that it may be submitted to arbitration, may have the facts ascertained in the first instance by a master or similar officer of the court.²³ The divorce act expressly authorizes the court, in all cases where the course of proceeding is not specially prescribed, to hear and determine all matters coming within its purview according to the course of proceeding in ecclesiastical courts and courts of equity, and to issue all proper and necessary processes.²⁴

Where the jurisdiction in divorce is vested in the court of chancery, the ordinary course of proceeding is to refer the question of

²⁰ R. L. ch. 152, sec. 34; *Wheeler v. Wheeler*, 2 Dane Ab. 310; *Bursler v. Bursler*, 5 Pick. 427; *Stevens v. Stevens*, 1 Met. 279; *Burrows v. Purple*, 107 Mass. 428; *Atkins v. Atkins*, Suffolk (1849), reported in 1 Bishop on Mar., Div. & Sep. sec. 1555, note; Appendix, Form No. 70 and note.

²¹ R. L. ch. 203, sec. 14; R. L. ch. 152, sec. 34.

²² *Stevens v. Stevens*, 1 Met. 279; Appendix, Form No. 70 and note.

²³ *Carter v. Carter*, 109 Mass. 306; *Stratton v. Stratton*, 77 Me. 373.

²⁴ R. L. ch. 152, sec. 29.

alimony to a master.²⁵ And in England, independently of any statute, the court of chancery may, with the consent of parties, refer a case pending therein to arbitration, and, according to the more modern authorities, when the agreement upon which the order of reference is made provides that the award shall be final, it can be set aside for the same causes only as at law.²⁶

184. Security Required.

When alimony or other annual allowance is decreed for the wife or children, the court may require sufficient security to be given for its payment according to the terms of the decree.²⁷

185. Attachment of Husband's Property.

Upon a libel by a wife for a divorce for a cause which accrued after marriage, the real and personal property of the husband may be attached to secure a suitable support and maintenance to her and to such children as may be committed to her care and custody.²⁸ The attachment is security for all sums which the wife may recover, whether for alimony or other allowance, pending the suit or upon final decree, or for costs and expenses.²⁹

Trustee Process.

The attachment may be made upon the summons issued upon the libel, in the same manner as attachments are made upon writs in actions at law, for an amount which shall be expressed in the summons or order of notice. It may be made by trustee process, in which case there shall be inserted in the summons or order of notice a direction to attach the goods, effects and credits of the libellee in the hands of the alleged trustee, and service shall be made upon the trustee by copy. The laws relating to attachments of real and personal estate apply to attachments to secure the payment of alimony.³⁰

²⁵ Peckford v. Peckford, 1 Paige, 274; Cooledge v. Cooledge, 1 Barb. Ch. 77.

²⁶ Knox v. Symmonds, 1 Ves. Jr. 369; Dick v. Milligan, 2 Ves. Jr. 23; Ford v. Gartside, 2 Cox Ch. 368.

²⁷ R. L. ch. 152, sec. 32; Slade v. Slade, 106 Mass. 499.

²⁸ R. L. ch. 152, sec. 10; Sewall v. Sewall, 130 Mass. 201; Sewall v. Sewall, 139 Mass. 157.

²⁹ Burrows v. Purple, 107 Mass. 428.

³⁰ R. L. ch. 152, secs. 11 and 12.

186. Successive Executions.

Successive executions may issue until the property attached is exhausted, and the attachment will continue until that time. The levy of such an execution will confer a title good as against a grantee of the husband after the attachment.³¹ In actions at law or in equity an attachment is good only for thirty days after final judgment,³² while in the case of a libel for divorce or for separate maintenance there is no final judgment which closes the proceeding as ordinary actions are closed.³³

187. Insolvency Proceedings.

An attachment by a wife to obtain separate support or alimony is subject to the statute, which provides that an assignment in insolvency proceedings dissolves any attachment on mesne process made not more than four months prior to the time of the first publication of notice of insolvency.³⁴ The wife is not entitled to a suitable support and maintenance in preference to the claims of the creditors of an insolvent husband, where her attachment has not existed four months prior to the act of insolvency.³⁵

188. Exceptions.

Exceptions will lie from a decree for the payment of alimony,³⁶ but no appeal lies to the full court in matter of fact. The full court has no authority to revise the findings of the judge who heard the case on matter of fact, if the evidence is sufficient to warrant the finding.³⁷ In a case of divorce or alimony a question of fact cannot be reserved on report by the full court.³⁸ The statutes have made the jurisdiction and practice as to the trial of facts, and the right of

³¹ *Downs v. Flanders*, 150 Mass. 92.

³² R. L. ch. 167, sec. 55.

³³ *Downs v. Flanders*, 150 Mass. 92; *Place v. Washburn*, 163 Mass. 530, 533.

³⁴ *Place v. Washburn*, 163 Mass. 530; R. L. ch. 163, secs. 51 and 54; R. L. ch. 153, sec. 35.

³⁵ *Place v. Washburn*, 163 Mass. 533.

³⁶ *Sparhawk v. Sparhawk*, 120 Mass. 390; *Brigham v. Brigham*, 147 Mass. 159; R. L. ch. 173, sec. 106.

³⁷ *Jamaica Pond Aqueduct Corporation v. Chandler*, 9 Allen. 159, 166; *Sparhawk v. Sparhawk*, 120 Mass. 390; *Smith v. Smith*, 167 Mass. 87; *Dickinson v. Dickinson*, 167 Mass. 474.

³⁸ *Stuart v. Stuart*, 123 Mass. 370.

exception in matter of law, to conform to the proceedings in actions at common law.³⁹

Non-entry of Exceptions.

If, upon granting a decree for divorce and alimony, the superior court allows a bill of exceptions, which the excepting party fails to enter in the supreme court, an application for an affirmance of the decree should be addressed to the superior court.⁴⁰

189. Alimony Pendente Lite.

The husband may be required to pay into court, for the use of the wife during the pendency of the libel, such sum of money, although exceeding the taxable costs, as may enable her to maintain or defend the libel; and she shall also, when it appears to be just and equitable, be entitled to alimony during the pendency of the libel.⁴¹

Counsel Fees.

It was not the practice, before the St. of 1851, ch. 82, sec. 1, to make allowance to the wife pending a libel for divorce; certainly not of counsel fees; and it was held that a husband was not liable for services rendered to his wife by a counsellor at law in successfully defending her against a libel for divorce filed by her husband.⁴²

This statute gave new powers to the court, which were differently construed by different judges. The court was finally clothed with full power to require the husband to supply the wife with means to prosecute or defend the suit.⁴³ Before the passing of the St. of 1855, the court had no power to grant alimony until after a decree of divorce.⁴⁴ The court will not enter into the question, as between attorney and client, as to what charges may properly be made, but the wife will be allowed a reasonable amount to meet the expenses of the suit, including counsel fees.⁴⁵

³⁹ R. L. ch. 173, sec. 106.

⁴⁰ *Ingalls v. Ingalls*, 150 Mass. 57; R. L. ch. 173, sec. 115.

⁴¹ R. L. ch. 152, sec. 14.

⁴² *Coffin v. Dunham*, 8 Cush. 404; *Shannon v. Shannon*, 2 Gray, 285; *Baldwin v. Baldwin*, 6 Gray, 341; *Wing v. Hurlburt*, 15 Vt. 607; compare *Conant v. Burnham*, 133 Mass. 503, 506.

⁴³ St. 1855, ch. 137, sec. 6; R. L. ch. 152, sec. 14.

⁴⁴ *Coffin v. Dunham*, 8 Cush. 405; *Shannon v. Shannon*, 2 Gray, 285; *Baldwin v. Baldwin*, 6 Gray, 342.

⁴⁵ *Baldwin v. Baldwin*, 6 Gray, 341.

Marriage De Facto.

A marriage de facto presents a proper case for the allowance of alimony pendente lite, although a marriage de jure is denied. So, also, in nullity suits, alimony pendente lite may be decreed upon proof of a marriage in fact.⁴⁶ It is not necessary, at this stage of the proceedings, that there should be as conclusive proof of the marriage as would be required for the ultimate purposes of the action, but the existence of the marital relation must be reasonably established. The merits will not be inquired into farther than to prove a prima facie case. The wife will then be furnished with the means of temporary support and of conducting the suit until the truth or falsity of her allegations can be ascertained at the trial on the merits. Alimony pendente lite continues, in the discretion of the court, until the proceedings are terminated.

Appeal from an Order for Alimony Pendente Lite.

An appeal from an order directing the payment of alimony pendente lite is not well taken unless a final decree has been entered in the superior court.⁴⁷ An order was made for alimony pendente lite by the superior court, which subsequently, at the hearing on the merits, dismissed the libel. The exceptions taken by the libellant were overruled. An entry was then made in the superior court, "Exceptions overruled as per rescript." The superior court, on application of the libellant, afterwards made an order directing execution to issue against the goods and estate of the libellee for alimony pendente lite, and the libellee appealed. It was held that the appeal was not well taken, as no final decree had been entered in the superior court, and the case was still pending in that court when the order was made. The entry, "Exceptions overruled as per rescript," was not a final decree. The question whether the original order for the payment of alimony had been revoked by the subsequent proceedings appeared not to have been raised in the court below, and was held not to be open on the appeal.⁴⁸

⁴⁶ Foden v. Foden, [1894] P. 307; Bain v. Bain, 2 Add. Ecc. 253; Smyth v. Smyth, 2 Add. 254.

⁴⁷ Cushing v. Cushing, 181 Mass. 209.

⁴⁸ Cushing v. Cushing, 181 Mass. 209.

190. Permanent Alimony May Be Decreed to a Guilty Wife.

Alimony may be awarded to the wife upon granting to the husband a divorce for her fault.

The power conferred by the statutes to decree alimony to the wife extends to all cases mentioned therein, and is not limited to those in which the decree of divorce was in her favor. The question whether she or her husband is the guilty party is doubtless an element, and an important element, in determining whether alimony should be awarded to her, but it is not conclusive. She may have been guilty of such a breach of the marriage obligation as to entitle her husband to a divorce; and yet it may not be just if her husband is comparatively rich, or capable of earning money, and she is poor or weak, that she should be turned out into the world without any way of securing a livelihood but her own exertions. The questions, whether she should be allowed any alimony, and of the amount of such allowance, are, in every case falling within the enumeration of the statute, whether she is the party offending or the party injured, within the discretion of the court, upon a consideration of all the circumstances of the case. Such has been the construction always given to our statutes, and to similar statutes by the courts of other states, whenever the power to grant alimony was not clearly limited by the legislature to the case of a divorce in favor of the wife.⁴⁹

The English parliament, upon granting a divorce to a husband for the adultery of his wife, always required him to make a provision for her out of his estate, and for this most just, humane and moral reason, that she may not be driven by want to continue in a course of vice.⁵⁰ Alimony has been granted to a wife in the English courts although her husband obtained a separation on the ground of her cruelty.⁵¹

191. Agreements in Relation to Alimony.

The parties, after a decree of divorce, may make such agreement

⁴⁹ *Brigham v. Brigham*, 147 Mass. 159; *Graves v. Graves*, 108 Mass. 314; *R. L. ch. 152*, secs. 14 and 30; *Sheafe v. Sheafe*, 4 Foster, 564; *Cross v. Cross*, 63 N. H. 444; *Sheafe v. Loughton*, 36 N. H. 240; *Buckminster v. Buckminster*, 38 Vt. 248; *Perry v. Perry*, 2 Barb. Ch. 311; *Goodden v. Goodden*, [1892] P. 1.

⁵⁰ *Best, J.*, in *Jee v. Thurlow*, 4 D. & R. 11, 17; *Pritch, Div. Dig.* 15 and note.

⁵¹ *Pritchard v. Pritchard*, 3 S. & T. 523; *Forth v. Forth*, 36 L. J. Mat. Cas. 122, 16 L. T., N. S., 574.

respecting alimony as they desire. An action may be maintained by a woman upon a promissory note given to her by her former husband, after she has obtained a divorce from him, in pursuance of a written agreement made before the divorce and conditioned upon the divorce being decreed, and which was called to the attention of the court granting the divorce, by the terms of which agreement, which were carried out by the parties, she was to convey her land to him and release dower and homestead, and he was to give her a sum of money and the note in suit, which were to be in lieu of alimony.⁵²

192. Wife's Re-Marriage as a Reason for Reducing Alimony.

Alimony, though granted by a decree of the court in pursuance of an agreement of the parties, is not a vested right beyond the power of the court to change, and the remarriage of the wife is *prima facie* cause for its reduction to a nominal sum. A stipulation for alimony to be decreed in a suit for divorce adds nothing to the force of the decree, and does not affect the power of the court to change the rights of the parties by further orders or decrees respecting alimony. The court upon petition has power to revise and modify the decree, as it deems reasonable upon all the circumstances of the case. The remarriage is a material change in the circumstances of the wife, giving her the right to be supported by another man, and in the absence of proof that this right is inadequate to all her needs, the court will deem it sufficient cause for revising the former decree, and for reducing the alimony to a nominal sum.⁵³

A husband, in consideration of his wife's withdrawing a libel for divorce, covenanted in articles of separation to pay her a sum yearly during her life. The wife afterwards, by another similar libel, obtained a decree for divorce from the bond of matrimony, and for alimony, which by agreement was fixed at the sum payable under the articles; and the wife, after receiving two installments of such alimony, married another man, whereupon the alimony was reduced by the court to a nominal sum, and the covenant, if ever made, was

⁵² Chapin v. Chapin, 135 Mass. 393.

⁵³ Southworth v. Treadwell, 168 Mass. 511; Graves v. Graves, 108 Mass. 314, 321; Foster v. Foster, 130 Mass. 189, 191; R. L. ch. 152, sec. 33; Sidney v. Sidney, 4 S. & T. 178; Bowman v. Worthington, 24 Ark. 522; Wetmore v. Wetmore, 48 L. R. A. 666. See Appendix, Form No. 20 and note.

held to be discharged.⁵⁴ A divorced woman, by her subsequent marriage, secures herself other resources for her support, and thus voluntarily furnishes the ground for the reduction of the alimony. The application for the modification of the decree is by petition in the original cause.⁵⁵

193. Alimony as the Debt of a Bankrupt.

Alimony does not arise from any business transaction, but from the relation of husband and wife. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. Permanent alimony is regarded rather as a portion of the husband's income, earnings or estate to which the wife is equitably entitled, than as strictly a debt. A decree for alimony is of the nature of a penalty for failure to perform a duty. A claim for alimony, whether for arrears accrued prior to an adjudication in bankruptcy, or for instalments accruing thereafter, does not constitute a provable debt under the bankrupt act of July 1, 1898, ch. 541, and is not barred by the bankrupt's discharge.⁵⁶ The bankrupt act of 1867 was similarly construed.⁵⁷

It has been decided in the District Court of the United States for the District of Massachusetts, that alimony decreed by the superior court to the wife of a bankrupt is not a debt provable against the husband's estate in bankruptcy. The court accordingly denied the bankrupt husband an injunction to restrain the wife from prosecuting proceedings for contempt which she had begun against him in the state court for his failure to comply with the decree for alimony.⁵⁸ Contempt proceedings to enforce payment of alimony proceed on the theory that the obligation to pay alimony is not a mere debt, else such process would violate the constitutional provisions against imprisonment for debt.⁵⁹

⁵⁴ *Albee v. Wyman*, 10 Gray, 222.

⁵⁵ R. L. ch. 152, sec. 33.

⁵⁶ *Audubon v. Shufeldt*, 181 U. S. 575; *Maisner v. Maisner*, 62 N. Y. App. Div. 286; *Re Shepard*, 97 Fed. Rep. 187; *Re Anderson*, 97 Fed. Rep. 321; *Re Nowell*, 99 Fed. Rep. 931; *Barclay v. Barclay*, 184 Ill. 375; 51 L. R. A. 351; *Noyes v. Hubbard*, 64 Vt. 302; 15 L. R. A. 394; *Menzie v. Anderson*, 65 Ind. 239; *Romaine v. Chauncey*, 129 N. Y. 566; 14 L. R. A. 712.

⁵⁷ *Re Lachemeyer*, (1878) 18 Nat. Bankr. Reg. 270, Fed. Cas. No. 7,966.

⁵⁸ *In re Nowell*, 99 Fed. Rep. 931.

⁵⁹ *Chase v. Ingalls*, 97 Mass. 524; *Pain v. Pain*, 80 N. Car. 322.

A discharge in bankruptcy is not a bar to a claim made by a wife against her divorced husband, under an agreement by which he was to pay certain sums of money in instalments toward the support of his wife and child.⁶⁰ It seems to be the law in England also that alimony is neither discharged nor provable in bankruptcy.⁶¹

194. Enforcement of Alimony.

Scire facias is a proper process to enforce payment of arrears of alimony.

The question has often been raised respecting the proper mode of proceeding to collect an instalment of alimony remaining unpaid; whether the wife shall have process of contempt for disobeying the order of the court to make periodical payments, or whether she shall have execution, upon motion and affidavit, showing that the parties are living, and that the alimony has not been paid; whether a notice to the husband to show cause should first be given, and if so, what length of notice and how given.⁶²

The writ of scire facias is one well adapted to the collection of successive payments, at fixed times, during the lives of the parties, or until the further order of the court, and is a proper process. It is a judicial writ, founded on a record, which must issue from and be returnable to the court where the record is, and the object of which is to revive a judgment between the same parties, and carry it into effect after a lapse of time. In ordinary cases alimony is the mere payment of money, and an execution for the amount is frequently ordered at the time of the decree. The parties being then before the court and subject to its jurisdiction, an execution may be ordered without the intervention of other process. But an order to pay money at successive future periods, though the persons and the sums are certain, is yet in its nature conditional. If the parties so long live is one condition. Without giving the party who is alleged to be in default an opportunity to be heard, the court cannot judicially know that both parties are alive, or that payment or satisfaction has not been made.⁶³

⁶⁰ *Dunbar v. Dunbar*, 180 Mass. 170.

⁶¹ *Linton v. Linton*, (1885) L. R. 15 Q. B. Div. 239; *Hawkins v. Hawkins*, (1894) 1 Q. B. 25; *Watkins v. Watkins*, (1896) P. 222; *Kerr v. Kerr*, (1897) 2 Q. B. 439.

⁶² *French v. French*, 4 Mass. 587; *Morton v. Morton*, 4 Cush. 518.

⁶³ *Morton v. Morton*, 4 Cush. 518; *Slade v. Slade*, 106 Mass. 499, 501; *Burrows v. Purple*, 107 Mass. 428; *Knapp v. Knapp*, 134 Mass. 353.

The libellant may at any time obtain by petition, properly supported, an order of notice returnable at such time as the court shall direct, and thereupon the court may order the issue of an execution, or such other process as may be appropriate. A petition is usually preferable to a scire facias, because the proceeding is more speedy and flexible.⁶⁴

Scire facias is also an appropriate process to obtain execution against the estate of a deceased person in the hands of his executor for arrears of alimony awarded to the plaintiff against the testator in his lifetime.⁶⁵

An execution in common form is the ordinary process to enforce a decree for the payment of money, but the court may in a proper case issue an attachment for contempt, or any other appropriate process, in the same manner as decrees are enforced in equity.⁶⁶ In equity, if a suit abates by death, the ordinary process to revive it is a bill of revivor; but it seems that if the suit abated by the death of the respondent after the decree has been signed and enrolled, the practice anciently was to revive the decree by a subpœna in the nature of a scire facias.⁶⁷ The existing practice is now governed by the chancery rules and by the statutes.⁶⁸ Under these statutes and rules a petition by the plaintiff is an appropriate remedy, as is also a writ of scire facias from the court where the record is. As a writ of scire facias can be brought against the husband to obtain an execution against him for alimony, which by a decree of the court he has been ordered to pay, there is no good reason why the same process should not be used to enforce such a decree by obtaining execution against his estate for arrears of alimony due at the time of his death, if any right of action to obtain such arrears survives his death.

A decree for alimony, whether for alimony already due, or to become due in the future, is in a certain sense a debt of record established by a judgment. As alimony out of the husband's property is

⁶⁴ *Slade v. Slade*, 106 Mass. 499, 501.

⁶⁵ *Knapp v. Knapp*, 134 Mass. 353; *Heapy v. Parris*, 6 T. R. 368; *Bragner v. Langmead*, 7 T. R. 20; *Earl v. Brown*, 1 Wils. 302; *Hildreth v. Thompson*, 16 Mass. 191; *Jefferson v. Morton*, 2 Wms. Saund. 12, note; *Wright v. Madocks*, 8 Q. B. 119; Appendix, Form No. 21.

⁶⁶ R. L. ch. 152, secs. 29 and 31; R. L. ch. 159, sec. 39.

⁶⁷ Story Eq. Pl. sec. 366.

⁶⁸ R. L. ch. 171, sec. 17; Rule 24 and 25.

a provision for the support of the wife by him, the obligation to pay it in the future necessarily ceases with the death of the husband, but amounts already due at the time of his death are in the nature of a debt then existing, and are payable out of his estate.⁶⁹

After the death of the husband no execution can issue against him, but if it issue at all it must issue against his goods and estate in the hands of his executor or administrator, and the executor or administrator should be made a party, and *scire facias* is an appropriate process to bring in the executor or administrator. A *scire facias* brought for this purpose is not an original suit, but is a continuation of the former suit, and is instituted in order to make the executor or administrator of the deceased debtor a party, and to obtain an execution to enforce the judgment or decree. It will be open to the executor or administrator, when thus brought in, to petition that the decree may be revised or altered, in the same manner as the husband, if living, could have done, and if there be any good ground to bar the plaintiff of her claim to one or more instalments of alimony alleged to be due, there will be full opportunity to plead and maintain it.⁷⁰ The writ should be brought after one year, and within two years after the appointment of the executor or administrator, and of his giving bond as such.⁷¹ There is no other statute of limitations applicable to a writ of *scire facias* brought for such purpose.

From the peculiar nature of a decree of alimony, and the right and power in the court to revise or alter it at any time, execution is not necessarily to issue for the full amount of arrears of alimony found to have been due and unpaid at the time of the death of the defendant's testator; but is in the discretion of the court, on the facts proved, to determine for what sum, if anything, the decree for alimony shall be enforced by an execution against his estate.⁷²

The provision of the statute, that decrees of record "shall be presumed to be paid and satisfied at the expiration of twenty years" after the rendition thereof, does not operate as an absolute bar to a writ of *scire facias* on such a decree; but the presumption may be

⁶⁹ *Smith v. Smith*, 1 Root, 349; *Wren v. Morse*, 1 Gilman, 560.

⁷⁰ *Morton v. Morton*, 4 Cush. 518; *Knapp v. Knapp*, 134 Mass. 353.

⁷¹ R. L. ch. 141, secs. 1 and 9.

⁷² *De Blaquiére v. Same*, 3 Hagg. Ecc. 322; *Wilson v. Wilson*, 3 Hagg. Ecc. 329, note; *Knapp v. Knapp*, 134 Mass. 353.

rebutted by evidence showing that the decree has not in fact been satisfied.⁷³

Alimony is not considered to be the separate property of the wife; but it is that portion of the husband's estate which is allowed her for her present subsistence and livelihood. It is unlike property held for her sole and separate use. She ought to apply it exclusively to her support; and upon her death the arrears belong to her husband, subject only to the payment of her debts. It is for this reason that the executor of the wife cannot recover any arrears of alimony against the husband, except for the payment of debts.⁷⁴

A husband who has entered into an agreement with his wife for a separation, and given a bond to a third person to secure the performance by him of the amount of arbitrators appointed to determine "what allowance shall be made and paid by him to his wife by way of alimony for her support and maintenance during the existence of the coverture between them," which has since been fixed by their award at a certain sum, payable quarterly, to be disposed of by the wife for the maintenance of herself and her daughter, "or otherwise as if she were a feme sole," cannot, after the death of his wife, maintain a bill in equity to restrain the obligee in the bond or his representatives from prosecuting a suit at law to recover arrears of such allowance, without alleging that she made no disposition of her property by will, and that no person has any legal or equitable claim upon her property.⁷⁵

195. Proceedings for Contempt.

Scire facias on the decree is not the exclusive remedy to enforce payment of arrears of alimony, and such payment may be enforced by proceedings for contempt; but the mere fact that the party from whom it is due refuses to pay, upon demand, though able to do so, is not of itself a sufficient cause for the issue of such process. There may be cases where an attachment for contempt would be ordered; but there should appear to be a contemptuous disobedience. The court will not issue an attachment where it appears that no contempt was intended.⁷⁶

⁷³ R. L. ch. 202, sec. 19; *Denny v. Eddy*, 22 Pick. 533; *Knapp v. Knapp*, 134 Mass. 353; *Walker v. Robinson*, 136 Mass. 280; *Day v. Crosby*, 173 Mass. 433.

⁷⁴ *Holbrook v. Comstock*, 16 Gray, 109, 110; *Allen v. Allen*, 100 Mass. 373, 374.

⁷⁵ *Holbrook v. Comstock*, 16 Gray, 109.

⁷⁶ *Slade v. Slade*, 106 Mass. 499; Appendix, Forms 22, 23 and 24.

If a party disregards or refuses to obey an order or decree for alimony, he is said to be in contempt, and may be punished as well as compelled to comply with the order or decree. The court making the order will usually issue a rule to the defendant to show cause why he should not be proceeded against for contempt. If at the hearing the charge is established, the court will issue its process, — commonly a writ of attachment, — directing the sheriff, or other proper officer, to take the person of such defendant, who must then “purge himself of the contempt,” as it is technically called, by compliance with the decree or order, and will not be discharged, nor be heard further in the case, until the duty or act imposed is fully performed, and, generally, all costs resulting from his misconduct paid. This form of process differs from the writ of attachment at common law in being a process against the person, and not to seize his property; and also from the writ of *capias ad satisfaciendum*, which is a common-law process against the person to obtain satisfaction of a judgment.

The party in contempt is not entitled to the benefit of any exemption, and if imprisoned for contumacy, as he may be,⁷⁷ has no remedy by which he can regain his liberty, except by the writ of *habeas corpus*.⁷⁸ The fact of contempt cannot be inquired into *de novo* in another court; there is no mode provided for such a proceeding.

A demand for the payment of alimony is usually necessary for the purpose of laying a foundation for contempt proceedings, but where the husband, before demand, positively declines to pay the alimony, no demand is necessary.

The failure to obey the order is not contumacious if the husband, without fault on his part, is unable to comply with the terms of the decree.⁷⁹ A transfer by a husband of his property to his son-in-law, in anticipation of a suit for divorce and alimony, does not constitute a contempt of court, but is competent evidence to show whether the husband has the property under his control.⁸⁰

The obligation to pay alimony is not a mere debt, and is not founded in contract. Imprisonment for its non-payment is therefore not imprisonment for debt.⁸¹ The authority to punish for contempt

⁷⁷ R. L. ch. 166, sec. 13.

⁷⁸ Const. of Mass., part 2, ch. 6, art. 7; R. L. ch. 191, sec. 25.

⁷⁹ *Russell v. Russell*, 69 Me. 336.

⁸⁰ *Stuart v. Stuart*, 123 Mass. 370.

⁸¹ *Chase v. Ingalls*, 97 Mass. 524.

may be exercised without infringing the constitutional guaranty of trial by jury.⁸² The duration of the imprisonment or the amount of the fine that can be imposed rests, in the absence of statute, entirely within the sound discretion of the court, governed by the principles of the common law.

196. *Fieri Facias* to Enforce Alimony.

Execution is a proper process for carrying into effect a decree for alimony, especially when the decree is for the payment of one sum at one time only, and is nearly similar to a common judgment for a debt.⁸³ It may also issue for alimony pendente lite.⁸⁴ It is provided by statute that the court may issue process of attachment and of execution, and other proper process necessary for the dispatch and final determination of such causes.⁸⁵

A Decree Necessary.

The court has no power to order an execution to issue for alimony unless there is a judgment or decree upon which it is founded. A mere agreement to pay alimony pending suit is insufficient, in the absence of a decree, to warrant the issuing of an execution therefor.⁸⁶ It has been held that the court will not issue execution for arrears of alimony without an affidavit that it is still unpaid, and notice to the respondent.⁸⁷

Under the modern statutes, although it is not usual to issue execution for alimony without previous notice and hearing, yet it is within the discretion of the court, upon a consideration of all the circumstances of the case, to order such an execution to issue without notice.⁸⁸ As a rule of practice, notice of an application for an alias execution will generally be given;⁸⁹ but it is within the discretion of the presiding judge, and the failure to give notice does not invalidate

⁸² *Brown's Case*, 173 Mass. 501; *Eilenbecker v. District Court, etc.*, 134 U. S. 31.

⁸³ *Orrok v. Orrok*, 1 Mass. 341.

⁸⁴ *Sewall v. Sewall*, 130 Mass. 201.

⁸⁵ R. L. ch. 152, sec. 29.

⁸⁶ *Bingham v. Bingham*, 147 Mass. 159.

⁸⁷ *French v. French*, 4 Mass. 587; *Newcomb v. Newcomb*, 12 Gray, 28.

⁸⁸ *Morton v. Morton*, 4 Cush. 518, 519; *Newcomb v. Newcomb*, 12 Gray, 28; *Chase v. Chase*, 105 Mass. 385; *Slade v. Slade*, 106 Mass. 499; *Bell v. Walsh*, 130 Mass. 163, 166.

⁸⁹ *Newcomb v. Newcomb*, 12 Gray, 28.

the execution. An alias execution to enforce a decree of alimony is not void because issued without notice to the debtor.⁹⁰

The husband may be lawfully arrested on the execution, or his real and personal property levied upon, as in ordinary actions.⁹¹ An arrest may be made on an execution issued upon a decree for alimony without an affidavit and certificate authorizing the arrest; neither affidavit nor certificate is necessary to authorize an arrest on such an execution.⁹² The fact that the magistrate who took the affidavit and made the certificate to authorize the arrest of a person on an execution was the attorney of record of the judgment creditor, does not render the officer liable in damages for making the arrest; if it was not disclosed by the precept nor actually known by him. The allowance of alimony, or the award to the wife of her own or a part of the husband's estate upon granting a divorce, is not a debt nor damages in the sense of the statute.⁹³

If a husband who has been arrested on an execution issued upon a decree for alimony makes application to take the oath for the relief of poor debtors, charges of fraud may be filed against him by his wife. He has no right to be discharged from imprisonment, except in the same manner, and subject to the same provisions of law, as a person arrested on execution for debt or damages in a civil action; and by applying to a magistrate to take the poor debtor's oath he assumes the risk of meeting charges of fraud filed by the creditor.⁹⁴ If the acts relied on to support the charges were done more than three months before the petition for alimony was filed, they are not done "since the cause of action accrued," within the meaning of the statute.⁹⁵ Charges of fraud against a person applying to take the oath for the relief of poor debtors are sufficient if stated with such fullness, clearness and precision as to inform him of the nature and

⁹⁰ Chase v. Chase, 105 Mass. 385, 388.

⁹¹ Orrok v. Orrok, 1 Mass. 341; French v. French, 4 Mass. 587; Chase v. Chase, 105 Mass. 385; Slade v. Slade, 106 Mass. 499; Burrows v. Purple, 107 Mass. 428, 434; Knapp v. Knapp, 134 Mass. 353, 354; Bailey v. Bailey, 166 Mass. 226; Foster v. Foster, 130 Mass. 189; R. L. ch. 152, secs. 29 and 31.

⁹² Chase v. Ingalls, 97 Mass. 524, 530; Bailey v. Bailey, 166 Mass. 226.

⁹³ Chase v. Chase, 97 Mass. 524.

⁹⁴ Chase v. Chase, 105 Mass. 385; Stockwell v. Stockwell, 100 Mass. 287; Foster v. Foster, 130 Mass. 189.

⁹⁵ Foster v. Foster, 130 Mass. 189.

particulars of the transaction intended to be proved against him, without being drawn with the technical precision required in an indictment or criminal complaint.⁹⁶

197. As Decrees are Enforced in Equity.

The statutes expressly provide that orders for alimony may be enforced in the same manner as decrees in equity, and that all matters of divorce and alimony, when the course of proceeding is not prescribed, may be heard and determined according to the course of proceeding in ecclesiastical courts and courts of equity.⁹⁷

Writ of Supplicavit.

The equity jurisdiction of the court does not warrant the issue of a writ of *supplicavit* on the petition of a wife against her husband, who is guilty of such cruel and abusive treatment of her as would sustain a libel for a divorce, and who refuses to support her and their minor children, although the petitioner has religious and conscientious scruples against applying for a divorce, and thereby obtaining alimony.⁹⁸

Chapman, C. J., said: "It never was a direct object of the writ of *supplicavit* to give alimony. Its purpose was to protect the complaining party from personal violence and abuse. Sometimes it was thought necessary to make a temporary provision for a wife who had left her husband because it was not safe to live with him, until he would receive her back. An attempt to use the process for the direct purpose of obtaining alimony to enable her to have a permanent separate maintenance would have been regarded as an abuse."⁹⁹

It has, indeed, been said that upon a writ of *supplicavit* in chancery, by the wife, for security of the peace against her husband, the court may, as an incident to the exercise of that jurisdiction, decree a separate maintenance to her. But it has been said, also, that there is no modern instance of any such exercise of authority.¹⁰⁰

198. Action at Law to Enforce Payment of Alimony.

It has been decided that *assumpsit* to recover alimony decreed on a

⁹⁶ *Stockwell v. Stockwell*, 100 Mass. 287.

⁹⁷ R. L. ch. 152, secs. 29 and 31; *Sparhawk v. Sparhawk*, 120 Mass. 390.

⁹⁸ *Adams v. Adams*, 100 Mass. 365, 372.

⁹⁹ *Adams v. Adams*, *supra*.

¹⁰⁰ 2 Story's Eq. (8th ed.) sec. 1423.

divorce from bed and board would lie by a wife against a husband,¹⁰¹ and debt for alimony after a divorce a vinculo was also sustained.¹⁰² Since that time the whole subject has undergone a complete statute revision, and the weight of previous decisions is thereby greatly diminished.

It has been held that a decree for alimony made by the supreme judicial court cannot be enforced by action thereon in the superior court, and presumably a similar decree of the superior court cannot be enforced in any other court.¹⁰³ It was not intimated that a decree for alimony rendered in another state may not be enforced in this commonwealth.¹⁰⁴ A decree for alimony is said by the supreme court of the United States to become a judicial debt of record against the husband, and that a suit may be brought in another jurisdiction to carry the decree into a judgment there with the same effect that it has in the state in which the decree was given.¹⁰⁵ The prevailing rule seems to be, that an action at law, on a final decree of a court of equity, may be maintained in another jurisdiction for the payment of a specific sum of money.¹⁰⁶

There is no presumption that a court of equity of another state had jurisdiction to entertain a suit to annul a marriage, or in such suit to pass an order for the payment of alimony pendente lite, or to enter a final judgment for arrears of alimony, counsel fees, and costs; but the existence of the jurisdiction must be proved at the trial of a suit to obtain an execution upon the judgment.¹⁰⁷

The reasons against allowing a common-law action to recover arrears of alimony are very strong. The fact that by the practice of divorce suits such a decree, in the court by which it is made, will be revised and altered for due cause shown; made greater or less as the necessities of the wife have increased or diminished, or taken away

¹⁰¹ *Wheeler v. Wheeler*, 1 Dane Ab. 358; *Davol v. Davol*, 13 Mass. 264.

¹⁰² *Howard v. Howard*, 15 Mass. 196.

¹⁰³ *Allen v. Allen*, 100 Mass. 373; *Knapp v. Knapp*, 134 Mass. 353; *Bailey v. Bailey*, 166 Mass. 226, 228.

¹⁰⁴ *Allen v. Allen*, 100 Mass. 373; doubting any intimation to the contrary in *Batley v. Holbrook*, 11 Gray, 212, 213.

¹⁰⁵ *Barber v. Barber*, 21 How. 582; *Lynde v. Lynde*, 181 U. S. 183; *Audubon v. Shufeldt*, 181 U. S. 575, 578.

¹⁰⁶ *Pennington v. Gibson*, 16 How. 65; *Trowbridge v. Spinning*, (Wash.) 54 L. R. A. 204.

¹⁰⁷ *Kelley v. Kelley*, 161 Mass. 111.

altogether when she has been guilty of flagrant misconduct; together with the circumstance that arrears of alimony do not survive the death of the wife, and are incapable of enforcement by her executor or administrator, present forcible arguments against allowing on such a decree an action at common law in which no modification of it can be made, but judgment must be given for or against it, as it stands.¹⁰⁸

199. Judgment for Alimony Nunc Pro Tunc.

A judgment for a divorce and alimony and costs, rendered after appearance and answer of the husband, may be affirmed nunc pro tunc as of the date of the argument where the husband has died since the argument of the cause. The death of the husband terminates the marriage, but the wife's rights to such alimony and costs, though depending on the same grounds as the divorce, are not impaired by the husband's death, and may be preserved by entry of judgment nunc pro tunc as of the day when the case was argued.¹⁰⁹

200. Alimony Ancillary to Divorce Proceedings.

The superior court can only decree alimony to the wife or a part of her estate, in the nature of alimony, to the husband upon a divorce, or upon petition at any time after a divorce. Proceedings for alimony must be ancillary to a suit for divorce. This is the practice in the ecclesiastical courts of England, where an original bill for alimony is not maintainable.¹¹⁰

Separate Maintenance.

An equivalent result, in the absence of divorce proceedings, may be accomplished by petition to the probate court by the wife for her separate support. The statute under which such proceedings may be instituted has been held to be constitutional.¹¹¹ Upon such petition an attachment of the husband's property may be made as upon a libel for divorce, and counsel fees awarded.¹¹² An appeal lies in such cases to the superior court, but the appeal does not ipso facto

¹⁰⁸ Allen v. Allen, 100 Mass. 373.

¹⁰⁹ Bell v. Bell, 181 U. S. 175.

¹¹⁰ R. L. ch. 152, sec. 30; Ball v. Montgomery, 2 Ves. Jr. 195; 2 Story's Eq. sec. 1422.

¹¹¹ R. L. ch. 153, sec. 33; Bucknam v. Bucknam, 176 Mass. 229.

¹¹² R. L. ch. 153, sec. 35.

vacate the decree.¹¹³ Application to suspend or stay the decree must be made to the superior court, and not to the probate court.¹¹⁴

The superior court may, without entering a decree of divorce, cause the libel to be continued upon the docket from time to time, and during such continuance may make orders and decrees relative to a temporary separation of the parties, the separate maintenance of the wife, and the custody and support of minor children. Such orders and decrees may be changed or annulled, as the court may determine, and shall, while they are in force, supercede any order or decree of the probate court.¹¹⁵

201. Criminal Liability.

A husband who unreasonably neglects to provide for the support of his wife renders himself liable to a criminal prosecution. All fines imposed under the provisions of the statute may, in the discretion of the court, be paid in whole or in part to the city, town, corporation, society or person actually supporting such wife at the time of making the complaint. Proof of neglect to provide for the support of a wife is prima facie evidence that such neglect is unreasonable.¹¹⁶

Marriage of Minors.

The marriage of minors, even without their parents' consent, emancipates them. An infant husband is liable criminally for the non-support of his wife, although he married without the consent of his father, who claimed and took his wages.¹¹⁷ Clergymen and others celebrating such marriages may be fined.¹¹⁸

¹¹³ R. L. ch. 162, sec. 18.

¹¹⁴ R. L. ch. 162, sec. 19.

¹¹⁵ R. L. ch. 152, sec. 17.

¹¹⁶ R. L. ch. 212, sec. 45.

¹¹⁷ Com. v. Graham, 157 Mass. 73.

¹¹⁸ R. L. ch. 151, secs. 25 and 41.

CHAPTER XX.

VENUE AND DOMICIL.

SECTION.

- 202. Venue in Divorce Cases.
- 203. Domicil — General Rule.
- 204. Domicil — Exception to General Rule.
- 205. Domicil — A Question of Fact.
- 206. Jurisdiction Based on Inhabitaney.
- 207. Allegation of Domicil and Jurisdictional Facts.
- 208. Jurisdiction of a Cross Libel.

202. Venue.

Libels for divorce shall be heard and determined in the superior court held for a county in which one of the parties lives, except that when the libellant has left the county in which the parties have lived together, the adverse party still living therein, the libel shall be heard and determined in the court held for that county.

All causes of divorce and alimony, by virtue of the constitution of this state, were originally heard and determined at Boston by the governor and council.¹ It finally became very expensive to the people of this state to be obliged to attend at Boston upon all questions of divorce, when the same might be done within the counties where the parties lived, and where the truth might be better discerned by having the witnesses present in court. A statute was accordingly passed to the effect that all questions of divorce and alimony should be heard and tried in the court held for the county where the parties live.² This provision has been substantially continued to the present time by subsequent statutes.³

A libel for divorce must be heard and determined in the court held for the county in which the parties or one of them live, and when the libellant has left the county in which the parties have lived together, the adverse party still living therein, the libel shall be heard and determined in the court held for that county. A libel filed in a county into which the libellant has removed, leaving the respondent in another county where the parties last lived together, will not be

¹ Constitution of Mass., part 2, ch. 3, art. 5.

² St. 1785, ch. 69, sec. 7.

³ R. L. ch. 152, sec. 6.

sustained.⁴ The statutory provision that when the libellant has left the county in which the parties have lived together, the adverse party still living therein, the libel shall be heard and determined in the court held for that county, means the county in which the parties last lived together. If the parties last lived in Norfolk county, where the libellee had his domicil, and when the libel is brought, as well as when it is heard, he still lives there, the libel must be heard and determined in that county.⁵

If a man living with his wife in the county of Norfolk is sentenced to be confined in the state prison in the county of Middlesex for six years, and is imprisoned accordingly, and he is afterwards adjudged bankrupt, and joins with his assignee in the sale of his homestead in the county of Norfolk, a libel against him while he is in prison must be heard in Norfolk county, notwithstanding the fact that the wife in the mean time may have moved into another county. He is "still living" in the county of Norfolk within the meaning of the statute. The word living in this connection means the same as having a domicil.⁶

Where husband and wife have had no permanent place of residence, a libel for a divorce may be filed in the county where the libellant dwells after separation.⁷ The court will sustain a libel for a divorce when the evidence is that the adultery was committed in another state, the respondent having no settled place of residence, and the libellant dwelling in the county where the libel is filed at the time of the adultery committed.⁸

203. Domicil.

It is a general rule that the domicil of the husband is the domicil of the wife.

There is an exception to this rule, that, under some circumstances, an innocent wife may have a separate domicil for the purpose of maintaining a libel against a guilty husband.

⁴ R. L. ch. 152, sec. 6; R. L. ch. 157, sec. 3; *Moore v. Moore*, 2 Mass. 117; *Richardson v. Richardson*, 2 Mass. 153; *Squire v. Squire*, 3 Mass. 184; *Merry v. Merry*, 12 Mass. 312; *Hanson v. Hanson*, 111 Mass. 158; *Banister v. Banister*, 150 Mass. 280.

⁵ *Banister v. Banister*, 150 Mass. 280.

⁶ *Hanson v. Hanson*, 111 Mass. 158.

⁷ *Lane v. Lane*, 2 Mass. 167.

⁸ *Squire v. Squire*, 3 Mass. 184.

It is a familiar rule of law that marriage creates a unity of the parties which gives them one domicile, and as the husband has the authority to determine where that domicile shall be, the wife's domicile, as a consequence, follows that of her husband. The domicile of the wife merges in that of her husband, and changes with his during coverture. This rule, though artificial and founded upon the theoretic identity of the persons and interests of the husband and wife, is doubtless of the highest importance to society, in that upon it rests to a great degree the unity and integrity of families and homes.⁹ The husband and wife may be living apart, yet in legal contemplation the domicile of the husband is the domicile of the wife.¹⁰

A man while imprisoned in the state prison, out of the county where he resided with his wife previous to his sentence, retains his domicile in the county where he then lived; and the sale, with his concurrence, of his homestead, after his imprisonment, and after his wife and family have removed from it, will be ineffectual to change his domicile.¹¹ He has the power to establish the family domicile, and it is the duty of the wife to follow him, and her refusal to do so without sufficient excuse amounts to desertion.¹² Even a promise before marriage not to take her away from the neighborhood of her mother and friends is not binding, and does not justify her refusal to accompany him to a new domicile.¹³

204. Exception.

The only exception to this rule is that an innocent wife may, under some circumstances, have a separate domicile for the purpose of maintaining a libel against a guilty husband; not that a wife who has left her husband, and is living apart from him without cause, has such

⁹ *Greene v. Greene*, 11 Pick. 410; *Hood v. Hood*, 11 Allen, 196; *Mason v. Homer*, 105 Mass. 116; *Burlen v. Shannon*, 115 Mass. 438; *Watkins v. Watkins*, 135 Mass. 83; *Loker v. Gerald*, 157 Mass. 42; *Burtis v. Burtis*, 161 Mass. 508; *Stoughton v. Cambridge*, 165 Mass. 251; *Pennsylvania v. Ravenel*, 21 How. 103; *Cheely v. Clayton*, 110 U. S. 701; *Dolphin v. Robins*, 7 H. L. Cas. 390; *Warrender v. Warrender*, 2 Cl. & F. 488.

¹⁰ *Greene v. Greene*, 11 Pick. 410; *Hood v. Hood*, 11 Allen, 196; *Burlen v. Shannon*, 115 Mass. 438; *Loker v. Gerald*, 157 Mass. 42; *Masten v. Masten*, 15 N. H. 159.

¹¹ *Hanson v. Hanson*, 111 Mass. 158.

¹² *Walker v. Loughton*, 11 Fost (N. H.) 111.

¹³ *Franklin v. Franklin*, 154 Mass. 515; *Schouler*, Dom. Rel. sec. 37 and 38.

a separate and exclusive domicile as will prevent him, if in good faith domiciled elsewhere, from obtaining a divorce from her in the place of his domicile.¹⁴ The wife has a right to acquire a separate domicile where the separation is caused by the husband's misconduct.¹⁵

Illustration.

In *Shaw v. Shaw*¹⁶ the parties left Massachusetts for Colorado, and the wife was compelled to leave the husband at Philadelphia on account of his cruelty. She returned to Massachusetts. It was held that after the delictum was committed by the husband which caused the wife to separate from him, and justified her in doing so, no subsequently acquired domicile of his could draw after it hers, and change it so as to deprive the courts of Massachusetts of their jurisdiction to grant a divorce for an offense committed while the domicile of both remained in this commonwealth. Nor is the circumstance that the delictum was committed out of this jurisdiction of any consequence.¹⁷

It has been said in a leading case on this point: "Although, as a general doctrine, the domicile of the husband is by law that of the wife, yet when he commits an offense, or is guilty of such dereliction of duty in the relation as entitles her to have it either partially or totally dissolved, she not only may, but must, to avoid condonation, establish a separate domicile of her own. This she may establish — nay, when deserted or compelled to leave her husband, necessity frequently compels her to establish — in a different judicial or state jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicile of her own."¹⁸ In this case the parties married in New York and were domiciled in Massachusetts, where the desertion occurred. The wife removed to Rhode Island, where she was granted a divorce.

It would also appear to be an equally reasonable exception to the

¹⁴ *Burten v. Shannon*, 115 Mass. 438.

¹⁵ *Harteau v. Harteau*, 14 Pick. 181; *Brett v. Brett*, 5 Met. 233; *Shaw v. Shaw*, 98 Mass. 158; *Burtis v. Burtis*, 161 Mass. 508; *Ditson v. Ditson*, 4 R. I. 87; *Shanks v. Dupont*, 3 Pet. 242; *Cheever v. Wilson*, 9 Wall. 124.

¹⁶ 98 Mass. 158.

¹⁷ *Harteau v. Harteau*, 14 Pick. 181; *Brett v. Brett*, 5 Met. 233; *Barber v. Barber*, 21 How. 582; *Yelverton v. Yelverton*, 1 Swab. & T. 574.

¹⁸ *Ditson v. Ditson*, 4 R. I. 87.

legal fiction that the domicile of the husband is the domicile of the wife, the only object of which is to protect parties in their just rights, that an innocent husband, who has left the state and is residing elsewhere, may treat the domicile of the wife as continuing here and as separate from him, in order that the alleged offense may be passed upon where it occurred, and where both parties then resided.¹⁹

The theory of law, that husband and wife are one person, and, wherever the wife may be actually, she is constructively with her husband, is not applicable to a wife who remains in a place where she and her husband last lived together after he is gone, and brings a suit against him for a divorce on his misconduct while they were together. She may retain her old domicile, acquired when she and her husband were actually abiding in the same place, and is not compelled to follow him to a place where she never lived, merely because before she discovered his offense she intended to go there with him; but this exception to the general law of domicile has no application in suits brought by the husband against the wife for her misconduct.²⁰

The doctrine that a wife may have a separate domicile from her husband when she seeks a divorce on account of a wrong inflicted upon her is well established, but the precise limits of it have never been settled by actual adjudication in this commonwealth. In some of the cases there are statements which imply that, from the time of a delictum which would justify the wife in leaving her husband, she should be treated as a person who has a right to fix her own domicile, and the husband should not be permitted to assert this fiction of law against her. But whether this exception to the general rule should be carried so far in favor of the wife as to permit her to acquire a new domicile before she brings a suit for a divorce is a question which has never been decided.²¹

205. Domicil is a Question of Fact.

A person's home or domicile is his habitation fixed in any place, without any present intention of removing therefrom.²² Two things must concur to constitute inhabitancy or domicile: First, residence;

¹⁹ *Watkins v. Watkins*, 135 Mass. 83.

²⁰ *Burtis v. Burtis*, 161 Mass. 508.

²¹ *Burtis v. Burtis*, 161 Mass. 508, 510.

²² *Putnam v. Johnson*, 10 Mass. 488; 2 Kent's Com. 431, note; *Viles v. Waltham*, 157 Mass. 542.

and second, the intention to make it a home — the fact and the intent. Residence for however long a time continued will not constitute domicil, unless accompanied with the intention of making it a home, nor will the shortness of time in which the new home is enjoyed defeat the acquisition of domicil, when accompanied with the intention.²³ The question of domicil is a question of fact, and the intention is evidence of the fact, but not conclusive; for to make domicil, both fact and intent must concur.²⁴

Every one must have a domicil somewhere, and a domicil once existing cannot be lost by mere abandonment, even when coupled with the intent to acquire a new one, but continues until a new one is in fact gained.²⁵ The former domicil remains until both the intent and fact of change of actual residence to another place have concurred to establish a new domicil there.²⁶ To prove a change of domicil it must be made to appear, not only that the old domicil had been abandoned, but also that a new one has been acquired; so that a domicil, being once fixed, will continue, notwithstanding the absence of the party, until there is a substitution of a new one. The intention to abandon an actual residence at another place, if not accompanied with the intention of remaining there permanently, or at least for an indefinite time, will not produce a change of domicil.²⁷

Acts and Conduct Evidence.

When one has changed his place of abode, and the question arises whether he intended to change his domicil, all his acts and conduct which fairly indicate his purpose in that particular within a reasonable time before and after the event may be put in evidence, together with the declarations accompanying such acts.²⁸

²³ *Ordway v. Howe*, Election Cases in Mass. (Loring and Russell) p. 3; *Olivieri v. Atkinson*, 168 Mass. 28; *Jennison v. Hapgood*, 10 Pick. 77.

²⁴ *King v. Park*, Loring & Russell's Election Cases in Mass. p. 155; Opinion of the Justices, 5 Met. 587; *Colleston v. Hailey*, 6 Gray, 517; *Fitchburg v. Winchendon*, 4 Cush. 190.

²⁵ *Abington v. North Bridgewater*, 23 Pick. 170; *Thorndike v. Boston*, 1 Met. 240; *Shaw v. Shaw*, 98 Mass. 158; *Bell v. Kennedy*, Law Rep. 3 H. L. 307.

²⁶ *Hallet v. Bassett*, 100 Mass. 167; *Borland v. Boston*, 132 Mass. 89.

²⁷ *Jennison v. Hapgood*, 10 Pick. 77, 98; *Sears v. Boston*, 1 Met. 250; *Somerville v. Somerville*, 5 Ves. 756.

²⁸ *Thorndike v. Boston*, 1 Met. 242; *Kilburn v. Bennett*, 3 Met. 199; *Cole v. Cheshire*, 1 Gray, 441; *Fisk v. Chester*, 8 Gray, 506; *Reeder v. Holcomb*, 105 Mass. 93; *Viles v. Waltham*, 157 Mass. 542.

Intention and Declaration of Intention.

The intention is to be distinguished from mere declaration of such intention; as *intention* is a fact to be proved by evidence, but *declaration of intention* is merely evidence tending to prove such fact, liable always to be controlled by other evidence, and being but one element in determining the fact, and where the acts of the person are inconsistent with his declarations, the intention must be ascertained as a fact upon the whole evidence.²⁹

Lex Domicilii Controls.

The general rule is that a divorce granted in the place of the domicil of both parties, and there valid, is good everywhere.³⁰

206. Jurisdiction Based on Inhabitaney.

No divorce shall be decreed if the parties have never lived together as husband and wife in the commonwealth; nor shall a divorce be decreed for a cause occurring in another state or country, unless, before such cause occurred, the parties had lived together as husband and wife in the commonwealth at the time when the cause occurred.

If the libellant has lived in the commonwealth for five years next preceding the filing of the libel, or, if the parties were inhabitants of the commonwealth at the time of their marriage, when the libellant has been such an inhabitant for three years next preceding such filing, a divorce may be decreed for any cause allowed by law, whether it occurred in the commonwealth or elsewhere, unless it appears that the libellant has removed into the commonwealth for the purpose of obtaining a divorce.

The law originally was that the court would not sustain a libel for a divorce when it appeared that the parties lived in another state at the time of the commission of the adultery, and that the libellant had since removed into this state.³¹

Where parties, who are residents of another state, are married there and reside there after marriage, and the husband there deserts the wife, and she afterwards removes into this state, and resides here

²⁹ Jenkins v. Shaw, Loring & Russell's Election Cases in Mass. p. 266; Wilson v. Terry. 11 Allen, 206, and 9 Allen, 214.

³⁰ Clark v. Clark, 8 Cush. 385.

³¹ Hopkins v. Hopkins, 3 Mass. 158; Carter v. Carter, 6 Mass. 263.

five years, the desertion being continued during that time, she is not entitled to a divorce under St. 1838, ch. 126, although she and her husband lived together in this state a part of the time between the marriage and the desertion. The court has no jurisdiction of such a case.³² No divorce, as the law formerly existed, was to be decreed for any cause if the parties had never lived together in this state; nor for any cause occurring in any other state, unless they had previously lived together in this state; nor for any cause occurring in another state, unless one of the parties was at the time of the occurrence living here, and this even if the divorce was sought for a cause recognized in this state.³³

By St. 1843, ch. 77, the court was empowered to grant divorces for causes occurring out of the commonwealth, if the libellant had resided five successive years within the commonwealth, and did not remove into the commonwealth for the purpose of procuring a divorce.³⁴ The requirements of the statutes, that the parties must have "lived together as husband and wife" in this commonwealth, means that they must have had a domicile here, and not merely lived together as travelers passing through the state, or as visitors for a purpose that is merely temporary, or not with intent to acquire a domicile. An inhabitant of another state does not acquire a domicile in this commonwealth by merely coming here to seek employment, with the intention of residing here only if he shall find it. The remedy is intended to be for the benefit of our own citizens, and not to enable the court to dissolve marital relations existing between citizens of other states, neither of whom has ever had a domicile here.³⁵ A similar interpretation has been given to a statute of Maine substantially like ours, though differing in phraseology.³⁶

The requirement of the statutes, that to give jurisdiction in certain cases of application for divorce the parties must have "lived together as husband and wife" in this commonwealth, is not satisfied by residence apart of the parties here, without cohabitation or communica-

³² Brett v. Brett, 5 Met. 233; Harteau v. Harteau, 14 Pick. 181.

³³ Rev. Sts. ch. 76, secs. 9, 10, 11; Brett v. Brett, 5 Met. 233.

³⁴ R. L. ch. 152, sec. 5.

³⁵ Harteau v. Harteau, 14 Pick. 183; Shaw v. Shaw, 98 Mass. 158; Ross v. Ross, 103 Mass. 575; Magrath v. Magrath, 163 Mass. 577.

³⁶ Calef v. Calef, 54 Me. 365.

tion with each other. Domicil without cohabitation is insufficient to satisfy the condition.³⁷

In a libel filed by a wife for a divorce on the ground of the desertion and cruel neglect of the husband, it appeared that the parties were married in the county of Berkshire, and after residing there for some years took up their residence in the state of New York, where the alleged desertion and cruel neglect took place; that the wife thereupon returned into that county to live, and filed her libel there, but that at the time when it was filed the husband retained his domicil in New York; and that such desertion and cruelty would be no ground of divorce by the laws of New York. The court refused to decree a divorce *a mensa et thoro*, on the ground that it had not jurisdiction of the case.³⁸

The jurisdiction to decree divorces is created by statute, and, except when the libellant has lived in this state five consecutive years next preceding the time of filing the libel, or three years if the parties were inhabitants of the commonwealth at the time of their marriage, "no divorce can be granted for any cause occurring in any other state or country unless before such cause occurred the parties had lived together as husband and wife in this state, and one of them lived in this state when the cause occurred."³⁹

The words "to live" and "to reside," as used in the statutes, are obviously synonymous, and both relate to the domicil of the party or the place where he is deemed in law to reside, which is not always the place of one's present actual abode. To live, to reside, to dwell, to have one's home or domicil, are usually, in the statutes, equivalent and convertible terms.⁴⁰

If the legal domicil of one of the parties to a libel for divorce, who lived together as husband and wife in this state before the time when the alleged cause of divorce occurred in another state, remained at that time within this jurisdiction, that is sufficient to satisfy the provisions of the statute, that in order to enable the divorce to be

³⁷ *Schrow v. Schrow*, 103 Mass. 574; *Weston v. Weston*, 143 Mass. 274; overruling *Eaton v. Eaton*, 122 Mass. 276.

³⁸ *Harteau v. Harteau*, 14 Pick. 181.

³⁹ R. L. ch. 152, sec. 4.

⁴⁰ Opinion of the Justices, 5 Met. 587; *Lee v. Boston*, 2 Gray, 490; *Colleston v. Hailey*, 6 Gray, 517; *Worcester v. Wilbraham*, 13 Gray, 586; *Shaw v. Shaw*, 98 Mass. 158.

decreed one of the parties must have been living in this state when the cause occurred.⁴¹

The court has jurisdiction notwithstanding the fact that the parties have never lived together as husband and wife within this commonwealth, if the libellant had a continuous residence here for more than five years next preceding the filing of his libel. The case is thereby brought within the exception stated in the statutes.⁴²

207. Allegation of Domicil and Jurisdictional Faets.

It is obvious that the court will not have jurisdiction if the parties have never lived together as husband and wife in this commonwealth, unless it is alleged and proved that the libellant has lived in the commonwealth for more than five consecutive years next prior to the filing of the libel, or that he has had such residence for three years prior to the filing of the libel, and that he lived in the commonwealth at the time of the marriage.⁴³

208. Jurisdiction of a Cross-Libel.

The court has jurisdiction of a cross-libel for divorce, brought by a husband residing in another state, for the cause of adultery in this commonwealth, where both parties then resided, and where the wife has since remained and filed her original libel, which was dismissed for want of prosecution.⁴⁴ The libellant, by coming into this state and submitting to its jurisdiction, may have his status and that of his wife absolutely determined so far as their rights and duties are concerned.⁴⁵

It has been repeatedly held in those states where a definite time of residence on the part of the libellant was necessary before bringing a libel, that where a resident had brought a petition for divorce, and a cross-libel had been filed, the dismissal or discontinuance of the original petition did not oust the jurisdiction, even if the party filing the cross-libel had not resided within the state for the time required to authorize him to bring a libel, and that, under it, affirmative relief would be given.⁴⁶

⁴¹ *Shaw v. Shaw*, 98 Mass. 158.

⁴² R. L. ch. 152, sec. 5; *Franklin v. Franklin*, 154 Mass. 515.

⁴³ Appendix, Form No. 26 and note.

⁴⁴ *Watkins v. Watkins*, 135 Mass. 83.

⁴⁵ *Forrester v. Watson*, 6 Se. Sess. Cas. (2d ser.) 1358; *Shields v. Shields*, 15 Se. Sess. Cas. (2d ser.) 142.

⁴⁶ *Watkins v. Watkins*, 135 Mass. 83, 87, and cited cases.

CHAPTER XXI.

PROCEDURE AND INCIDENTS.

SECTION.

- 209. Signing the Libel.
- 210. Procedure When Either Party is Insane.
- 211. Answer Must be in Writing.
- 212. Evidence Must be Corroborated.
- 213. No Divorce on Default.
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- 215. Party Not to Impeach His Own Witness.
- 216. Extent of Cross-Examination Discretionary.
- 217. Libel Dismissed Generally and Without Prejudice.
- 218. Jury Trials Abolished.
- 219. Writ of Protection.
- 220. Attachments.

209. Signing of the Libel.

The libel must be signed by the libellant, if of sound mind and legal age to consent to marriage; otherwise it may be signed by the guardian of the libellant or by a person admitted by the court to prosecute the libel as next friend.

Prior to the Statute.

It was early decided, before the subject was regulated by statute, that the signing of a libel by attorney was a practice to be discountenanced and avoided. The libel in that case was subscribed by one naming himself as attorney for the libellant. The court objected to the practice, observing that there was no evidence that the supposed libellant had any knowledge of the filing of the libel in her name. The attorney stated that the libel was made and prosecuted by direction of the libellant, whereupon the court sustained the libel, but cautioned the bar against such a practice in the future.¹

A libel for divorce from the bonds of matrimony was sued by a person who had been appointed guardian over the libellant, by the probate court, as a spendthrift. The court said it would be monstrous to dissolve a marriage upon such an application, as it could not be known that the party ever gave his assent to the prosecution, and dismissed the libel, observing that the libellant, if he desired a divorce

¹ Willard v. Willard, 4 Mass. 506 (1808).

and had sufficient ground to obtain one, must file his libel in his own name.²

Under the Statute. Libellant Sane.

The first decision under the statute held that a libel for a divorce filed by a libellant of sound mind cannot be sustained if it be signed by his attorney, although the attorney was specially empowered to sign it. The libel was signed, "E. W. Gould, by his attorney, D. Brigham." The libellant resided in Missouri, and had executed a letter of attorney to Brigham, containing a special authority to prosecute for a divorce, and to sign the libel. The court held that the provisions of the statute, taken in connection with former decisions and practice, were too explicit to admit of doubt that the libel must be signed personally by the libellant.³ A libel for divorce which is not signed by the libellant is fatally defective.⁴

Libellant Insane.

If the libellant is insane a libel for divorce may be filed and prosecuted in his behalf either by his guardian or by a next friend appointed by the court for that purpose.⁵ The court also has authority to entertain a petition filed by a third person, representing that a libellant is insane; and, if such insanity is established, the court will appoint a guardian ad litem to conduct the cause for the libellant. The general rule is that where persons are incapable of acting for themselves, although not strictly idiots or lunatics, the suit may be brought in their name, and some suitable person will be authorized to carry it on as their next friend. In every instance it is in the discretion of the court to allow the case to proceed. The power of the court to act is not taken away by the statute requiring a libel in behalf of an insane person to be signed by the guardian or some person admitted by the court to prosecute the same as the next friend of the libellant,⁶ or by the provisions as to the case of one becoming insane after the institution of proceedings for divorce,⁷

² Winslow v. Winslow, 7 Mass. 96 (1810); Richardson v. Richardson, 50 Vt. 119.

³ Gould v. Gould, 1 Met. 382 (1840).

⁴ Philbrick v. Philbrick, 27 Vt. 786.

⁵ Denny v. Denny, 8 Allen, 311; Garnett v. Garnett, 114 Mass. 379; Cowan v. Cowan, 139 Mass. 377; R. L. ch. 152, sec. 7.

⁶ R. L. ch. 152, sec. 7; Story Eq. Pl. sec. 66.

⁷ R. L. ch. 171, sec. 18.

or by the more general provisions authorizing the judge of probate to appoint a guardian to an insane person.⁸

Amendments and Answers.

The rules of the superior court for the regulation of practice in divorce prescribe that the libel, all amendments thereto, and, in contested cases, answers, shall be signed by the parties.⁹

210. Insanity of Either Party.

If either party is insane, the libel may be prosecuted or defended by his guardian, or the court may appoint a guardian for the suit, as the case may require.

If, at any time during the pendency of the suit, the respondent is insane, whether such insanity began before or since the filing of the libel, the defense may be conducted by a guardian appointed by the court in which the libel is pending; and if upon a hearing sufficient cause is shown, a divorce may be decreed.¹⁰ If during the pendency of the libel either party becomes insane, the action may be prosecuted or defended by his guardian in like manner as if it had been commenced after the appointment of the guardian, or the court may appoint a guardian for the suit, as the case may require.¹¹

Appointment of Guardian is a Finding of Insanity.

Where the statute authorizes the court to appoint a guardian during the case "if the respondent is insane," such appointment is equivalent to a judgment that the respondent is insane, and is prima facie evidence of the fact in any stage of the case.¹²

211. If the Libellee Appears and Intends to Defend, He Must Answer the Libel in Writing.

It is a general rule in all cases where there is an appearance, and a defense is intended to be made, that there must be an answer in

⁸ R. L. ch. 145, sec. 6: *Denny v. Denny*, 8 Allen, 311.

⁹ Divorce rule VI.

¹⁰ *Broadstreet v. Broadstreet*, 7 Mass. 474; *Mansfield v. Mansfield*, 13 Mass. 412; *Little v. Little*, 13 Gray, 264; R. L. ch. 152, sec. 13; *Garnett v. Garnett*, 114 Mass. 379; St. 1902, ch. 544, sec. 21.

¹¹ R. L. ch. 171, sec. 18; *Mitchell v. Kingman*, 5 Pick. 431; *Davenport v. Davenport*, 5 Allen, 464; *Denny v. Denny*, 8 Allen, 311; 2 Kent's Com. (14th ed.) 229.

¹² *Little v. Little*, 13 Gray, 264.

writing. The answer should be a clear assignment of the reason why the divorce should not be granted.¹³

The rule of court regulating the time of entering appearances and filing answers in common-law actions and equity proceedings is not observed in divorce cases. An answer or plea to a libel will be received at any time before the final disposition of the case; and no answer is usually required to be filed when only the general issue is to be pleaded. If the libellant asks the libellee for an answer, which is not voluntarily furnished, the court would undoubtedly, upon motion, order one filed. If, however, the libellant sees fit to go to trial without an answer having been filed by the libellee, it will be too late at the argument, upon a report of the case, to object that no answer was filed. Such conduct on the part of the libellant is, to all intents and purposes, a waiver of his right to have an answer filed at the proper stage of the proceedings.¹⁴

212. Evidence Must be Corroborated.

It is a general rule of practice not to grant a divorce from the bonds of matrimony, or to enter a decree of nullity of marriage upon the uncorroborated testimony of the libellant.

It was early decided that the libellee's confessions of adultery were not admissible in evidence unless corroborated in some material part by other testimony or the attendant circumstances of the particular case.¹⁵ The party's confession may and does aid other evidence, but the decree must not rest alone, nor perhaps essentially, on such confessions; for there is great danger of collusion between the parties, or of confession extorted, or made designedly, to furnish means to effect a divorce. This principle is adhered to and enforced for reasons of public policy, and to depart from it would render fraud, collusion or conspiracy possible, and be attended with consequences injurious to society. If a divorce a vinculo matrimonii were granted under such circumstances, the marital relation would depend solely upon the will of the parties, and could be renounced at pleasure.¹⁶

¹³ *Orrok v. Orrok*, 1 Mass. 341.

¹⁴ *Morrison v. Morrison*, 136 Mass. 310.

¹⁵ *Baxter v. Baxter*, 1 Mass. 345; *Holland v. Holland*, 2 Mass. 154; *Washburn v. Washburn*, 5 N. H. 195; *White v. White*, 45 N. H. 121; *Burn's Eccl. Law*, tit. Marriage, sec. 11.

¹⁶ *Robbins v. Robbins*, 100 Mass. 150.

In *Billings v. Billings*¹⁷ a divorce was granted solely on a confession of the husband, who wrote to his wife after a long absence that he had been living with another woman, by whom he had children, and expressed his penitence and desire for a reconciliation. This was held sufficient proof of adultery without other evidence, and is believed to be the only case where no corroborative evidence was required.

The principle was originally derived from the ecclesiastical law, which in all cases required any fact to be proved by two witnesses, and declined to accept the evidence of a witness unless corroborated, but this rule was never adopted in its entirety in this country.¹⁸

A canon of 1603 provided that "good circumspection and advice be used, and that the truth may, as far as possible, be sifted out by the depositions of witnesses, and that credit be not given to the sole confession of the parties themselves, however taken upon oath, either within or without the court."¹⁹

The confessions and admissions of the parties are admissible in the absence of a prohibitive statute. But if the libellant is the only witness it cannot be held as matter of law that the judge is bound to believe the testimony.²⁰

No such statute exists in this commonwealth. Accordingly, it has been held that the usage of not granting a divorce upon uncorroborated evidence is merely a general rule of practice, and not an inflexible rule of law, adhered to when other evidence can be procured, and sometimes relaxed if no other evidence exists, or can be obtained. "The rule," said Gray, J., "upon which the judges have usually acted in these cases, of not granting a divorce upon the uncorroborated testimony of the libellant, is merely a general rule of practice and not an inflexible rule of law. When other evidence can be had, it is not ordinarily safe or fit to rely upon the testimony of the party only. But sometimes no other evidence exists or can be obtained. The parties are made competent witnesses by statute, and there is no law

¹⁷ 11 Pick. 461; *Summerbell v. Summerbell*, 37 N. J. Eq. 603 and 609; *Tewksbury v. Tewksbury*, 2 Dane Ab. 310.

¹⁸ *Noverre v. Noverre*, 1 Rob. Eccl. 428; *Williams v. Williams*, 1 Hag. Con. 229; *Grant v. Grant*, 2 Curt Eccl. 16; *Owen v. Owen*, 4 Hag. Eccl. 261.

¹⁹ See *Collet's Case*, T. Jones, 213; *Cobbe v. Garston*, Milward, 537.

²⁰ *Littlefield v. Littlefield*, 174 Mass. 216; *Robbins v. Robbins*, 100 Mass. 150; *Vance v. Vance*, 8 Me. 132; 17 Am. Digest (Century Ed.) p. 631, sec. 405.

to prevent the finding of a fact upon the testimony of a party whose credibility and good faith are satisfactorily established.”²¹

This opinion best accords with the great degree of caution exercised in receiving and weighing the evidence of confessions in other cases, and by analogy a prisoner's confession, when the corpus delicti is not otherwise proved, has been held insufficient for his conviction.²² The rule stated in the text is in force in England under the present divorce act.²³

213. No Decree of Divorce on Default.

If a libellee is defaulted, a decree of divorce will not be entered without a hearing, and it is incumbent on the libellant to establish the allegations in the libel by satisfactory evidence; a practice founded upon the theory that the state is a party and is not bound by the confessions and admissions of the husband or wife.

214. Private Conversations.

Private conversations between husband and wife are inadmissible in evidence.

Common-law Rule.

It is well established that, at common law, husband and wife are excluded on consideration of policy from testifying to confidential conversations between them. The doctrine has been broadly stated in England that a wife who has been divorced by an act of parliament cannot be called to prove any conversation which happened between herself and her husband during the coverture.²⁴ The husband's death does not weaken the principle, but it seems rather to increase than lessen the force of the rule.²⁵

The authorities are reviewed, and the doctrine is thoroughly discussed in an action brought by an administrator to recover goods which the wife had pledged to the defendant, and she was offered by the defendant to prove that her husband had, in a private conversa-

²¹ Robbins v. Robbins, 100 Mass. 150.

²² 1 Greenl. Ev. sec. 217.

²³ Robinson v. Robinson, 1 Sw. & Tr. 362; Williams v. Williams, L. R. 1 P. & D. 29. For English adjudications, see Taylor on Ev. vol. 2, sec. 768.

²⁴ Monroe v. Twistleton, Peake Ev. by Norris, App. 29; also reported in Peake, Add. Cas. 219; Averson v. Kinnaird, 6 East, 194; 1 Greenl. Ev. sec. 254.

²⁵ Doker v. Hasler, Ry. & Mood. 198; Stein v. Bowman, 13 Pet. 209.

tion, authorized her to pledge them. Her testimony was excluded, and the doctrine was reaffirmed that considerations of policy protect all private conversations between husband and wife from disclosure, not only during the coverture, but after it has ceased to exist. The happiness of the marriage state requires that the confidence between man and wife shall be kept forever inviolable.²⁶

Statutory Rule.

The legislature has by statute extended the competency of witnesses in certain cases: and where it makes husbands and wives admissible it provides that "they shall not be allowed to testify as to private conversations with each other." This includes conversations on subjects which are not confidential in their nature; and adopts the doctrine of *O'Connor v. Marjoribanks*. Our statutes have not changed the common-law rule in this respect.²⁷

This exclusion of testimony is, however, to be strictly confined to mere conversation between the parties, and is not to be extended so far as to exclude evidence of everything said by one of the parties in the absence of other persons. The word "conversation" in the statute does not include all language between husband and wife. Mere abusive language addressed by one party to the other when they are not in conversation may be the subject of testimony by the party to whom it is addressed, and would be competent evidence.²⁸ A conversation between the parties when no one else was present, and there was no abuse, threat, or assault, in which the husband asked the wife to return home, and she refused to go back and live with his family, is a private conversation within the meaning of the statute, and is inadmissible.²⁹ The fact that the conversation accompanies and explains certain acts of the parties is not sufficient to take it out of the operation of the rule.³⁰

²⁶ *O'Connor v. Marjoribanks*, 4 Man. & Gr. 435.

²⁷ *Dickerman v. Graves*, 6 Cush. 308; *Dexter v. Booth*, 2 Allen, 559, 561; *Bliss v. Franklin*, 13 Allen, 244; *Robinson v. Talmadge*, 97 Mass. 171; *Raynes v. Bennett*, 114 Mass. 424, 427; *Babcock v. Booth*, 2 Hill, 181; *Hyde v. Gannett*, 175 Mass. 177; R. L. ch. 175, sec. 20, cl. 1; 1 Greenl. Ev. sec. 254; *Baldwin v. Parker*, 99 Mass. 79.

²⁸ *French v. French*, 14 Gray, 186.

²⁹ *Fuller v. Fuller*, 177 Mass. 184.

³⁰ *Jacobs v. Hesler*, 113 Mass. 157; *Raynes v. Bennett*, 114 Mass. 424, 427; *Drew v. Tarbell*, 117 Mass. 90; *Brown v. Wood*, 121 Mass. 137; *Com. v. Cleary*, 152 Mass. 491; *Lyon v. Prouty*, 154 Mass. 488; *Fuller v. Fuller*, 177 Mass. 184.

Particular Cases.

The testimony of a husband that he was authorized by his wife, in a private conversation between them, to borrow a sum of money on her account, and to include it in promissory notes made jointly by the husband and wife to the lender, is inadmissible to charge the wife upon the notes.³¹ The testimony of witnesses to statements made to them by a husband and wife, in regard to a transaction between them, when no one else was present, is inadmissible.³² So, also, in an action against an executor to recover the price of goods sold and delivered to the wife of the testator in his lifetime, she cannot be allowed to testify to a private conversation with her husband in which he ratified her purchase.³³ A husband charged with crime cannot prove in defense the effect of private conversations between his wife and himself.³⁴

Conversation Must Be Private.

The conversation in order to be privileged must be private; that is, it must not have taken place in the presence of a third person. A conversation between husband and wife held in the presence of young children of the family only, who are not shown to have taken any part in, or paid any attention to it, is a private conversation within the purview of the statute forbidding husband or wife to testify as to private conversations with each other.³⁵ But a conversation between husband and wife in the presence of their daughter, fourteen years old, concerning a matter in which she naturally would be interested, and which would be likely to attract her attention, has been held rightly admitted in evidence.³⁶ A conversation in the presence of a third person, who hears part of it, is not a private conversation within the meaning of the statute.³⁷ A private conversation between husband and wife, who thought that no one overheard them, may be testified to by a concealed listener.³⁸

³¹ *Drew v. Tarbell*, 117 Mass. 90.

³² *Brown v. Wood*, 121 Mass. 137.

³³ *Dexter v. Booth*, 2 Allen, 559.

³⁴ *Com. v. Cleary*, 152 Mass. 491; *Com. v. Hayes*, 145 Mass. 289.

³⁵ *Jacobs v. Hesler*, 113 Mass. 157.

³⁶ *Lyon v. Prouty*, 154 Mass. 488.

³⁷ *Fay v. Guynon*, 131 Mass. 31.

³⁸ *Com. v. Griffin*, 110 Mass. 181.

Letters Admissible.

It is only private conversations between husband and wife which the statute excludes, and not written communications. Their letters are admissible in evidence.³⁹

215. Party Not to Impeach his Own Witness.

A party who offers a witness thereby admits his credibility, and represents him as worthy of belief.⁴⁰ A party could not, at common law, directly impeach his own witness, but if his witness was false or mistaken in his testimony he could prove the truth by other witnesses.⁴¹

The statute passed in 1869, and taken almost verbatim from the English statute of 17 and 18 Vict., ch. 125, sec. 22, abrogated the rule of the common law.⁴² It was designed to relieve a party from the embarrassment resulting from the adverse testimony of a hostile witness. A party producing a witness cannot impeach his credit by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his testimony. The circumstances of the supposed statements must be called to the attention of the witness before he can be impeached, and he must be allowed to explain them. The object of the statute is simply to allow the party to impeach the credibility of his witness by showing, in the manner pointed out, that he has made statements inconsistent with his testimony, and the contradiction can have no legal tendency to establish the truth of the subject-matter of the statements.⁴³

If a party calling a witness attempts to contradict his testimony without previously calling his attention to the statements in question, the evidence will be excluded.⁴⁴ Merely asking a witness,

³⁹ *Com. v. Caponi*, 155 Mass. 534.

⁴⁰ 1 Greenl. Ev. sec. 442.

⁴¹ *Brown v. Bellows*, 4 Pick. 194; *Whitaker v. Salisbury*, 15 Pick. 544, 545; *Com. v. Starkweather*, 10 Cush. 59.

⁴² *Adams v. Wheeler*, 97 Mass. 67 and cited cases; *Ryerson v. Abington*, 102 Mass. 526; R. L. 175, 24.

⁴³ *Ryerson v. Abington*, 102 Mass. 526; *Brannon v. Hursell*, 112 Mass. 63; *Day v. Cooley*, 118 Mass. 524; *Brooks v. Weeks*, 121 Mass. 433; *Manning v. Carberry*, 172 Mass. 432.

⁴⁴ *Ryerson v. Abington*, 102 Mass. 253; *Batchelder v. Batchelder*, 139 Mass. 1; *Wilton v. Humphreys*, 176 Mass. 253.

whom it is sought to contradict on reëxamination, whether he has made a certain statement to a particular person, with no attempt to designate the time or place, and no suggestion of any reason for not specifying them, or of circumstances which rendered them unnecessary, is not mentioning "the circumstances of the supposed statements sufficient to designate the particular occasion" within the meaning of the statute.⁴⁵ The testimony sought to be contradicted must be material to the issue.⁴⁶ If the testimony of a witness is struck out of the case, on the ground of her misapprehension of her privilege as a witness, the party calling her cannot put in her declarations or admissions to contradict her under the statute.⁴⁷

216. Extent of Cross-Examination Discretionary.

The extent to which a cross-examination shall extend, where no competent evidence is excluded, is left to the discretion of the judge presiding at the trial, who may impose a reasonable limitation upon the cross-examination of a witness.⁴⁸

217. Libel Dismissed and a Dismissal "Without Prejudice."

The entry of the decree "libel dismissed" is an adjudication upon the merits and a final disposition of the cause, both as to those matters which were formerly put in issue and those which might have been pleaded, but if the words "without prejudice" are added it is not final and the matter may be litigated anew upon a subsequent libel.

According to our practice, the usual form of a final decree against the libellant is, that the libel be dismissed. In this respect it is like a final decree against a plaintiff in equity.⁴⁹ If it is not intended to be a bar to a new libel for the same cause, it should appear by the record that the dismissal was "without prejudice," or otherwise not upon the merits.⁵⁰ The libellant has no absolute right to a dismissal of his suit without prejudice after a hearing and the submission of

⁴⁵ *Com. v. Thyng*, 134 Mass. 191.

⁴⁶ *Force v. Martin*, 122 Mass. 5; *Batchelder v. Batchelder*, 139 Mass. 1.

⁴⁷ *Mayo v. Mayo*, 119 Mass. 290.

⁴⁸ *Rand v. Newton*, 6 Allen, 38; *Munro v. Stowe*, 175 Mass. 169, 172.

⁴⁹ *Bigelow v. Winsor*, 1 Gray, 301; *Burrowscale v. Tuttle*, 5 Allen, 377, 378; *Durant v. Essex Co.*, 8 Allen, 103-108; S. C., 7 Wall. 107; *Story Eq. Pl. sec. 793*.

⁵⁰ *Foote v. Gibbs*, 1 Gray, 412; *Thurston v. Thurston*, 99 Mass. 39; *English v. English*, 12 C. E. Green, 579-586; *Burton v. Burton*, 58 Vt. 414.

the cause to the court, yet the court may, in the exercise of a sound discretion, enter a dismissal without prejudice, even though the libellee objects and demands a decree upon the merits.⁵¹

The entry of such a decree is, therefore, entirely in the discretion of the court, and being in the nature of a nonsuit, does not bar a future proceeding for the same cause.

If there is no limitation upon the effect of the words "without prejudice," they must be taken to have been used generally, and to mean without prejudice to the right of the libellant to bring a new suit and to try it as if the questions involved were all presented for the first time.⁵²

The entry, "Libel dismissed," without the addition of the words "without prejudice," is a final judgment upon the merits, and is a bar to a subsequent libel for the same cause of divorce alleged in the first libel. In collateral proceedings it is not conclusive by way of estoppel, or as evidence, except upon matters actually tried and determined; ⁵³ but as a final dispositoin of that for which the suit was brought it is, like a judgment by default, conclusive as well in regard to the matters which might have been pleaded as those which were formally put in issue.⁵⁴

If the husband's libel for divorce is dismissed because of his failure to establish the wife's adultery, he cannot allege the same acts as a defense to her suit for divorce.⁵⁵ So, also, a husband who has sued for a divorce for desertion, and, failing to prove the cause assigned, has had his libel dismissed generally, cannot afterwards obtain a divorce for adultery committed and known to him before the filing of the first libel, and which he shows no reason for not having then assigned as a ground of divorce.⁵⁶

Good faith and justice required the husband, if he intended at any future time to rely on the graver charge, to suggest the fact before the first libel was dismissed, so that the court might, if thought con-

⁵¹ *Ashmead v. Ashmead*, 23 Kan. 262.

⁵² *Burtis v. Burtis*, 161 Mass. 508.

⁵³ *Burlen v. Shannon*, 99 Mass. 200.

⁵⁴ *Bradley v. Bradley*, 160 Mass. 258; *Lewis v. Lewis*, 106 Mass. 309; *Fera v. Fera*, 98 Mass. 155; *Merriam v. Whittemore*, 5 Gray, 316; *Lyster v. Lyster*, 111 Mass. 328; *Slade v. Slade*, 58 Me. 157; *Lea v. Lea*, 99 Mass. 493; *Brown v. Brown*, 37 N. H. 536.

⁵⁵ *Lewis v. Lewis*, 106 Mass. 309; *Robinson v. Robinson*, 2 Prob. Div. 75.

⁵⁶ *Bartlett v. Bartlett*, 113 Mass. 312.

sistent with the interests of the parties and of the public, order the dismissal to be without prejudice to a subsequent libel, and the libellee might take measures to preserve any evidence material to her defense. The husband not having done this, or shown any reason for not doing it, must be deemed to have waived any right to a divorce depending exclusively upon facts existing and known to him at the time of his first application to the court. If he had discovered any new evidence, or the wife appeared to have been guilty of any misconduct since the dismissal of the first libel, the case would have stood in a different position.⁵⁷

If the former judgment be an adjudication between the same parties and against the libellant of issues which tend directly to disprove the allegations contained in the libel, then it is admissible in evidence under an answer denying those allegations. A former judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent libel for the same cause of action, not only upon all the issues which were actually tried, but upon all issues which might have been tried in the former action; so that a new libel for the same cause of action, between the same parties, cannot be maintained or defended on grounds which might have been tried and determined in the former action. But when the second suit between the same parties is upon a different cause of action from the first, the judgment in the former action is conclusive only upon those issues which were actually tried and determined. What those issues were may appear from the record, or may not, but when extrinsic evidence is necessary in order to determine what issues were actually tried and determined, or to establish the identity of the parties or of the subject-matter, such evidence may be introduced for that purpose; and only such issues as are found to have been actually tried and determined, and on which the judgment was rendered, or such issues as by reasoning are essential to and necessarily involved in the former judgment, are to be considered as conclusively determined between the parties.⁵⁸

⁵⁷ *Bartlett v. Bartlett*, *supra*; *Clement v. Kimball*, 98 Mass. 535; *Edgerly v. Edgerly*, 112 Mass. 53; *Vance v. Vance*, 17 Me. 203; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Mortimer v. Mortimer*, 2 Hagg. Consist. 310; *Green v. Green*, L. R. 3 P. & D. 121.

⁵⁸ *Foye v. Patch*, 132 Mass. 105; *Burlen v. Shannon*, 3 Gray, 387-392; *Arnold v.*

Sometimes it cannot be determined either from the record or extrinsic evidence which one of several issues raised at the trial induced the court to take the action in question. For instance, a decree dismissing, after a hearing on its merits, the libel of a husband, on the Gen. Sts., ch. 107, sec. 7, for a divorce from his wife on the ground of her desertion continued for five years consecutively, without his consent, in defense against which she denied that she was guilty in manner and form as alleged, and specified that her withdrawal from him was caused by his extreme cruelty, or his wanton and cruel neglect to provide suitable maintenance for her, being of sufficient ability so to do, is no bar to a libel filed by her against him, on the same statute, for a divorce for the same desertion.⁵⁹ This decision proceeds upon the theory that there were three sufficient defenses relied on by the libellee, and, without any means of determining upon which of these the verdict was rendered, the court held that it would not be conclusive as to either.

When there are several grounds on which a libel may be dismissed on the merits, the libellant has not necessarily, as matter of law, the right to select for the court the particular ground on which it must act, and to have this incorporated in the decree.⁶⁰ If the court had no jurisdiction its judgment is void, and the decree is not a bar to another suit for divorce. The recitals in its record of facts showing jurisdiction may be contradicted and a divorce granted in the subsequent suit.⁶¹

218. Jury Trials Abolished.

All causes of divorce and alimony are now tried and determined by the court without a jury; although, at one time, jury trials were allowed in such cases.

The judge in the ecclesiastical practice always passed upon the law and the facts. This procedure prevails here in the absence of statute. A jury trial was never had on libels for divorce until it

Arnold, 17 Pick. 7; Davis v. Spooner, 7 Pick. 147; Hood v. Hood, 110 Mass. 463; Outram v. Morewood, 3 East. 346; Wagner v. Wagner, 36 Minn. 239.

⁵⁹ Lea v. Lea, 99 Mass. 493.

⁶⁰ Wiley v. Wiley, 161 Mass. 446.

⁶¹ Sewell v. Sewell, 122 Mass. 156; Gilman v. Gilman, 126 Mass. 26; Folger v. Columbian Ins. Co., 99 Mass. 267; Carleton v. Bickford, 13 Gray, 591; Williams v. Williams, 130 N. Y. 193; Blain v. Blain, 45 Vt. 538.

was allowed by the statute of 1855, ch. 56.⁶² This act permitted either party to a libel for divorce, at any time before the trial was commenced, and if at a jury term, before the jurors were dismissed, to make and file with the clerk of the court a demand in writing for a trial by jury; and the questions of fact arising upon such libel were to be tried under the direction of the court, the proceedings were to be conducted as nearly as possible in the manner of conducting suits at common law, and a decree was to be entered in conformity with the verdict. This act was repealed, leaving such causes to be tried, as formerly, by the court without a jury.⁶³

A statute, so far as it provides that when a wife is living apart from her husband for justifiable cause, and he fails to support her, the court may make such order as it deems expedient for the support of the wife and the maintenance of the minor children, is constitutional, although it makes no provision for a trial by jury.⁶⁴ By parity of reasoning the statute of 1877, ch. 178, is constitutional, as the fifteenth article of the Declaration of Rights, affirming the right of trial by jury "in all controversies concerning property, and in all suits between two or more persons," excepts "cases in which it has heretofore been otherways used and practiced." The seventh article of amendment of the Constitution of the United States is limited to suits at common law, and does not apply to the state courts.⁶⁵

219. Writ of Protection.

Parties and witnesses attending court in good faith are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning, whether they are residents of this state or come from abroad, whether they attend on summons or voluntarily, and whether they have or have not obtained a writ of protection.⁶⁶ But it is equally within the power of the court out of

⁶² St. 1857, ch. 255; G. S. ch. 107, sec. 15; *Burlen v. Shannon*, 99 Mass. 200.

⁶³ St. 1877, ch. 178, sec. 4.

⁶⁴ St. 1874, ch. 205; R. L. ch. 153, sec. 33; *Bigelow v. Bigelow*, 120 Mass. 320 (1876).

⁶⁵ *Twitchell v. Commonwealth*, 7 Wall. 321; *Com. v. Hitchings*, 5 Gray, 432.

⁶⁶ *Thompson's Case*, 122 Mass. 428; citing: *M'Neil's Case*, 6 Mass. 245; *Wood v. Neale*, 5 Gray, 538; *May v. Shumway*, 16 Gray, 86; *Persee v. Persee*, 5 H. L. Cas. 671.

which the process issues to discharge on motion a person arrested by abuse of that process, or any one arrested in violation of privilege may, like any other person unlawfully imprisoned or restrained of his liberty, be discharged on habeas corpus.⁶⁷ The principal use of a writ of protection is to prevent the trouble of an arrest, and an application for discharge, by showing it to the arresting officer.⁶⁸

220. Attachments.

Attachments are made by inserting a prayer in the libel that the real and personal estate of the libellee may be attached to a certain amount.⁶⁹ The practice varies in different counties as to whether the order authorizing the attachment will be issued by the clerk, or whether it is still necessary to obtain a special order of the court. The invariable practice in Suffolk county is to go before the court, and at an ex parte hearing obtain such order, but in some counties, where a justice is not so readily accessible, the clerk issues the order under a statute which authorizes him to issue any order of notice upon any petition or other proceeding at law or in equity which might be issued by the court.⁷⁰

⁶⁷ Wood v. Neale, 5 Gray, 538; May v. Shumway, 16 Gray, 86; Selby v. Hills, 8 Brig. 166.

⁶⁸ 1 Greenlf. Ev. sec. 316; Appendix, Forms 76 and 77.

⁶⁹ Appendix Form No. 7.

⁷⁰ R. L. ch. 165, sec. 22; Appendix, Forms Nos. 5, 6.

CHAPTER XXII.

PROCEEDINGS FOR A DIVORCE.

SECTION.

- 221. Filing the Libel.
- 222. Negative Averments.
- 223. Joinder of Causes.
- 224. Order of Notice.
- 225-226. Personal Service of the Libel.
- 227. Service by Publication.
- 228. Appearance of Libellee.
- 229. Continuances.
- 230. Rules Regulating Practice in Divorce.
- 231. Standing Orders.

221. Filing the Libel.

Proceedings for a divorce are commenced by filing in the office of the clerk of the superior court a libel, which is a petition alleging the cause or causes for which relief is sought, and containing a prayer for a decree of divorce, and such other orders as may be desired.¹ The libel should contain a statement of every fact the proof of which is made necessary by the statute in order to the granting of the divorce. The material facts should be alleged with certainty to a common intent, omitting all impertinent or scandalous matter. It is sufficient to state the grounds for divorce in the language of the statute, and observe the common rules of pleading. If, however, the allegations are too general and vague, the court, on motion of the libellee, may order specifications to be filed. The granting of a special order requiring greater particularity or specifications as to time and place is exclusively within the discretion of the court.²

222. Negative Averments.

An exceptional practice prevails in some jurisdictions requiring the libellant to allege that the offense was committed without the consent, connivance, privity or procurement of the libellant, and that the libellant has not voluntarily cohabited with the libellee since the discovery of the adultery or other acts constituting the marital offense. The general rule which obtains here is that connivance,

¹ R. L. ch. 152, sec. 6; Appendix, Form No. 1.

² *Adams v. Adams*, 16 Pick. 254; *Harrington v. Harrington*, 107 Mass. 329; *Mumford v. Mumford*, 13 R. I. 19.

collusion, condonation and recrimination are matters of defense only, and that to negative them in the libel is needless and irregular.³

223. Joinder of Causes.

More than one ground of divorce may be inserted in the libel, and proof of any one or more of them, in the absence of a defense, will be sufficient: thus, a charge of cruelty and adultery may be joined in the same libel, and the court will decree according to the evidence produced.⁴ It was formerly the common practice to draw the prayer in the alternative for either kind of divorce, whether a vinculo or a mensa et thoro.⁵ If the record of a case, when different causes of divorce are alleged in the libel, fails to show the ground upon which a decree therein was rendered, the statement of the case and the opinion of the court printed in the authorized reports are admissible to show it.⁶

Libellee May Rest on Evidence Introduced Under Either Count.

If the libel alleges more than one cause of divorce, such as desertion and adultery, and the libellee, by permission of the court, rests his case on the issue of adultery upon the evidence introduced by the libellant, and takes the stand as a witness on the issue of desertion, the libellant will not be permitted to cross-examine him on the issue of adultery. The two counts are for separate causes of action, and the election of the libellee to rest on one count upon the evidence introduced by the libellant closes the case on that count. The libellant then has no right to put in any evidence on the issue of adultery, unless the judge in his discretion allows that branch of the case to be reopened.⁷ It has never been decided that the libellee has a right to rest on one count and go into evidence on the other without the permission of the court.⁸

224. Order of Notice.

Upon the filing of the libel the court or clerk may order the libellee to be summoned to appear and answer at the court having jurisdiction

³ Pastoret v. Pastoret, 6 Mass. 276.

⁴ Young v. Young, 4 Mass. 430.

⁵ Young v. Young, 4 Mass. 430; Fera v. Fera, 98 Mass. 157.

⁶ Hood v. Hood, 110 Mass. 463.

⁷ Cushing v. Cushing, 180 Mass. 150.

⁸ Cushing v. Cushing, 180 Mass. 150.

of the cause, by the publication of the libel or the substance thereof, with the order thereon, in one or more newspapers which shall be designated in the order, or by delivering to the libellee an attested copy of the libel and a summons, or in such other manner as it or he may require. If the order is made by the clerk the court may order an additional notice. If the libellee does not appear, and the court considers the notice defective or insufficient, it may order further notice.⁹

The process which issues upon filing a libel, though in form an order of notice, is in legal effect a summons. It is the process by which the libellee is directed to appear in court and answer to a civil action, and has always been treated by the statutes, from the St. of 1785, ch. 69, to the latest revision in 1902, as in the nature of a summons issued by a common-law court, and not as in the nature of a citation from an ecclesiastical or civil law court.¹⁰

225. Personal Service of the Libel.

If the libellee is described as residing within the commonwealth, personal service must be made upon him fourteen days before the return day, which is the first Monday of every month. If the libellee lives out of the state, that fact must be stated in the libel, or personal notice will be required.¹¹ The absence of the respondent on a voyage merely is not such an absence from the state as will authorize proceedings upon the libel, without personal notice to him.¹² If personal service is ordered, a service of the libel and summons by reading,¹³ or by leaving the summons at the respondent's last and usual place of abode, is not sufficient.¹⁴

Personal service upon a libellee who is confined in the state prison for a term of years is regular, and the court will not set aside or open a decree by default obtained upon such service, unless it appears that the libellee by reason of his situation was deprived of a meritorious

⁹ R. L. ch. 165, sec. 22; R. L. ch. 152, sec. 8; *Leavitt v. Leavitt*, 135 Mass. 191; Appendix, Forms No. 2, 3, 4, 5, and 6.

¹⁰ *Leavitt v. Leavitt*, 135 Mass. 191.

¹¹ *Homston v. Homston*, 3 Mass. 159; *Choate v. Choate*, 3 Mass. 391; *Anon.*, 5 Mass. 197; *Smith v. Smith*, 6 Mass. 36; R. L. ch. 167, sec. 24.

¹² *Mace v. Mace*, 7 Mass. 212.

¹³ *Smith v. Smith*, 9 Mass. 422.

¹⁴ *Randall v. Randall*, 7 Mass. 502; *Labotiere v. Labotiere*, 8 Mass. 383.

defense.¹⁵ A libellee who is a convict in the state prison, if he desires to be present at the trial or to testify, may be brought into court by a writ of habeas corpus.¹⁶

The practice is to require the same service upon infants, or upon persons under guardianship or of unsound mind, as upon other defendants, and then to give notice of the proceedings to the guardian, if there be any, and he does not appear without notice; and if the guardian does not appear and defend the action in the name of the ward, or if there is no guardian, a guardian ad litem should be appointed for that purpose.¹⁷

226. Libel Must be Served by a Deputy Sheriff.

The process issuing upon a libel for divorce must be served by a deputy sheriff. A constable or a private person has no authority to make such service, unless by special order of the court.¹⁸

It was said in *Leavitt v. Leavitt*, supra: "We do not decide that, in an exceptional case, the court has not the power, in its discretion, to accept as sufficient a service made by a constable or a private citizen; but it is not bound to do so, and may properly require a service by a deputy sheriff as a safeguard against the danger of deception and imposition."

The statutes give the court the broadest discretion in deciding as to the sufficiency of the service. It is the constant practice to require some evidence in addition to the return of service to show that the order has been served upon the right person, and, if such evidence is not furnished, to order that further service be made.¹⁹ A witness who knows the parties should accompany the deputy sheriff at the time of service, and point out the identical person named as the libellee. The name of this witness is usually included in the officer's return, and he should be produced at the trial to prove the identity of the party served upon.

227. Service by Publication.

In all other cases than where the libellee is described as residing

¹⁵ *Phelps v. Phelps*, 7 Paige, 150.

¹⁶ *Newhall v. Jenkins*, 2 Gray, 562.

¹⁷ *Cumington v. Belchertown*, 149 Mass. 223; *Taylor v. Lovering*, 171 Mass. 303.

¹⁸ *Brown v. Brown*, 15 Mass. 389; *Leavitt v. Leavitt*, 135 Mass. 191.

¹⁹ *Leavitt v. Leavitt*, 135 Mass. 191; Divorce Rule I.

within the commonwealth, service may be made by publication, the last publication to be at least fourteen days before the return day, and in addition an attested copy of the libel, with the order thereon, shall be sent by letter, registered when practicable, to the residence of the libellee, as set out in the libel, or where none is thus set out, to the last known residence. Proof of the identity of the party served, and if personal service is not made, of actual notice, where practicable, will be required.²⁰

An order to give notice by publishing "three weeks successively" in a newspaper is complied with by publishing in such paper three successive weeks, although there is not an interval of a week between each publication.²¹ It is always advisable to supplement the constructive notice by publication with actual notice. The libellant should use every effort to locate the libellee by inquiring of his relatives, acquaintances and former associates for the purpose of ascertaining his whereabouts and giving personal notice, if possible. If this precaution is not taken, the case is liable to be continued for further service, thereby causing unnecessary delay and expense.²²

Personal service, in addition to notice by publication and registered letter as ordered by the court, may be made upon the libellee in another state or country by a deputy sheriff who is qualified to serve such process in that jurisdiction. There should be affixed to the return an affidavit that it is true, and the certificate of the clerk of a court of record that the officer was qualified to serve all civil process in that locality.²³

Misprint of a Name Invalidates the Service.

Where a libellant stated her original name to have been Launders, and in the copy published, to give notice to the other party, the name was written Saunders, the notice was held insufficient. The default was taken off, a further notice ordered, and the cause continued.²⁴ The order of notice, whether by publication or by personal service, together with the affidavit or return of service, must be filed with

²⁰ Divorce Rule I; R. L. ch. 167, sec. 27.

²¹ Bachelor v. Bachelor, 1 Mass. 256.

²² Divorce Rule I; Randall v. Randall, 7 Mass. 502; Labotiere v. Labotiere, 8 Mass. 383

²³ Appendix, Form No. 80 and note.

²⁴ Jenne v. Jenne, 7 Mass. 94.

the clerk before the case is placed on the trial list.²⁵ Affidavits of notice by publication must be accompanied by a copy of each issue of the newspaper in which the same was ordered published, containing a copy of the libel and order.²⁶ No libel served by publication will be placed upon the trial list unless the affidavit of notice, newspapers, and copy sent to the newspaper for publication have been filed with the clerk.

228. Appearance of Libellee.

Where personal service is made the libellee shall have ten days, and where service is by publication, if described as in any part of the United States east of the Mississippi river, or in the States of Louisiana, Missouri, Iowa or Minnesota, one month; if described as in any other of the United States, or New Brunswick, Nova Scotia, or Canada, two months; if described as elsewhere in the United States, or in Great Britain, Ireland or France, three months; and if described as in other foreign parts or residence unknown, six months, from the return day, within which to appear.²⁷

229. Continuances.

The court, as in other suits, may grant continuances to permit an amendment of the pleadings to promote a reconciliation of the parties, to obtain further evidence, or for any other reason deemed proper; its decision is discretionary and not the subject of exception.²⁸

230. Rules for the Regulation of Practice in Divorce.

The statute conferring upon the superior court jurisdiction in matrimonial causes gave authority to establish all necessary rules of practice.²⁹ A rule of court has the force of law, and is equally binding upon the parties and the court. If no discretionary power is reserved, it cannot be dispensed with to suit the circumstances of any particular case.³⁰ The construction and legal effect of such rules

²⁵ Appendix, Forms Nos. 2, 3, 74, 75; Divorce Rule I.

²⁶ Divorce Rule I.

²⁷ Divorce Rule II.

²⁸ *Kittredge v. Russell*, 114 Mass. 67.

²⁹ St. 1887, ch. 332, sec. 6.

³⁰ *Thompson v. Hatch*, 3 Pick. 512; *Tripp v. Brownell*, 2 Gray, 402; *Baker v. Blood*, 128 Mass. 543, 545; *Pratt v. Pratt*, 157 Mass. 503, 505.

cannot be finally determined by the superior court, but is a matter of law subject to the revision of the full court.³¹

Rule I.

Where the libellee is described as residing within the commonwealth, personal service shall be made. In all other cases service may be made by publication, the last publication to be at least fourteen days before the return day, and, in addition, an attested copy of the libel, with the order thereon, shall be sent by letter, registered when practicable, to the residence of the libellee, as set out in the libel, or where none is thus set out, to the last known residence. Proof of the identity of the party served, and, if personal service is not made, of *actual notice*, where practicable, will be required. The order of notice, whether by publication or by personal service, together with the affidavit or return of service, shall be filed with the clerk before said cases are placed upon the trial list, and all divorce cases must be marked for trial in the several counties as provided by the common-law rules. Affidavits of notice by publication must be accompanied by a copy of each issue of the newspaper in which the same was ordered published, containing a copy of the libel and order.³²

Rule II.

Where personal service is made, the libellee shall have ten days, and where service is by publication, if described as in any part of the United States east of the Mississippi river, or in the states of Louisiana, Missouri, Iowa or Minnesota, one month; if described as in any other of the United States, or New Brunswick, Nova Scotia, or Canada, two months; if described as elsewhere in the United States, or in Great Britain, Ireland or France, three months; and if described as in other foreign parts or residence unknown, six months, from the return day, within which to appear.

Rule III.

All causes arising upon appeals from the Probate Court to this court shall be entered on the divorce docket and placed upon the trial list of divorce cases.

³¹ Rathbone v. Rathbone, 4 Pick. 89.

³² See Common Law Rules XIX and XXI.

Rule IV.

The divorce list will be taken up in Suffolk county in October, January and May at designated times, and be proceeded with in its order, giving precedence to the uncontested cases, and no case will be heard at any other time except for special cause shown. In other counties where there are no separate sessions for court work the divorce list will be taken up at each sitting, at such time as the presiding justice shall designate, and be proceeded with in the same manner.

Rule V.

At any time before the expiration of six months from the granting of a decree of divorce nisi, the libellee, or any other person, may file in the office of the clerk for the county in which the libel is pending, a statement of objections to an absolute decree; such statement to set forth the facts on which it is founded, verified by affidavit. The court may by general order direct that such decree shall not become absolute until such objections have been disposed of by the court.

It is within the power of a single justice in a divorce case, where a cause arises, after the six months which may influence his decision in refusing to make a decree absolute, to admit evidence thereof.³³

For practice and forms under the statute of 1867, ch. 222, sec. 2, see 98 Mass. 408; 104 Mass. 567.

Rule VI.

The libel, all amendments thereto, and in contested cases answers, shall be signed by the parties.³⁴

NOTE. — It is discretionary with the court to allow a libel to be amended without terms during the trial. The rule of the court for the regulation of practice at common law in imposing terms in the event of an amendment after the case is placed on the trial list does not apply to a suit for a divorce.³⁵

231. Standing Orders.

In all cases where application by any party interested is filed within six months from the entry of a decree of divorce nisi, such

³³ Pratt v. Pratt, 157 Mass. 503 (1892); St. 1893, ch. 280; R. L. ch. 152, sec. 18.

³⁴ R. L. ch. 152, sec. 7.

³⁵ Harrington v. Harrington, 107 Mass. 329, 334. See Common Law Rule VII.

decree shall not become a decree absolute until such application has been disposed of by the court or a justice thereof.

Order for Disposition of Business in Suffolk County.

Libels for divorce will be heard in the Second Division the first three weeks of October, January and May, and during those weeks no list of equity causes for hearing on the merits will be made.

APPENDIX.

FORMS AND PRECEDENTS.

No 1.

Form of Libel.

The following is a common form of the libel for divorce, the order of notice thereon, whether by personal service or by publication, and the order of the court authorizing the attachment of the real and personal property of the libellee:

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

SUFFOLK, ss.

To the Honorable the Justices of the Superior Court to be holden at
Boston, within and for the County of Suffolk,

RESPECTFULLY libels and represents.....
of
.....in said County, that he was lawfully married
to now
of
.....
at on
the.....day of.....A. D. , and
thereafterwards your libellant and the said.....lived
together as husband and wife in this Commonwealth, to wit, at....
.....
.....
that your libellant has always been faithful to his marriage vows and

obligations, but the said.....being wholly regard-
less of the same, at.....

.....
on.....the.....day of

A. D. 190.....

Wherefore your libellant prays that a divorce from the bonds of
matrimony may be decreed between your libellant and the said

Dated this.....day of.....A. D. 190 ..

No. 2.

Order of Notice by Personal Service.

COMMONWEALTH OF MASSACHUSETTS.

MIDDLESEX, ss.

In Superior Court,.....A. D. 190 ..

UPON THE libel aforesaid, it is ordered that the libellant notify the
libellee to appear before our Justices of said Court, at Cambridge, in
said County, on the first Monday of.....next, by

causing an attested copy of said libel and of the order thereon, to be served upon said libellee fourteen days at least before said last mentioned day, that he may then and there show cause, if any he have, why the prayer in said libel set forth should not be granted.

.....,

Clerk.

A true copy of the libel and of the order thereon.

Attest,

.....,

Clerk.

No. 3.

Order of Notice by Publication.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.

SUPERIOR COURT.

Clerk's Office, Boston.....A. D. 190 .

On the filing of the foregoing libel, it is ordered that the libellant give notice to the said libellee.....of the pendency thereof, and to appear before said Court at Boston, within and for the County of Suffolk, on the first Monday of.....next, by causing an attested copy of h said libel with this order thereon, to be published once a week, three weeks successively, in the.....a newspaper printed in Boston, in the County of Suffolk, the last publication to be fourteen days at least before the said first Monday of....., and by sending by mail to the last known address of the said libellee as soon as may be, a registered letter containing an attested copy of said libel and order thereon; or by causing the said libellee to be served with an attested copy of said libel and order fourteen days at least before said first Monday of....., that the said libellee may then and there show cause why the prayer of said libel should not be granted.

.....

Clerk.

A true copy of libel and order thereon.

Attest:

.....

Clerk.

No. 4.

The Same — Another Form of Order by Publication.

COMMONWEALTH OF MASSACHUSETTS.

MIDDLESEX, SS.

SUPERIOR COURT,.....A. D. 190 .

UPON THE libel aforesaid, it is ordered that the libellant notify the libellee to appear before our Justices of said Court, at Cambridge, in said County, on the first Monday of.....next, by causing an attested copy of said libel and of the order thereon, to be published in the....., a newspaper published in..... in the County of.....once a week, three weeks successively, the last publication to be fourteen days at least before the said last mentioned day, and that an attested copy of said libel and order thereon be sent by registered letter to the residence of the libellee as set out in the libel — last known residence of the libellee, that he may then and there show cause, if any he have, why the prayer in said libel set forth should not be granted.

.....
Clerk.

A true copy of the libel and of the order thereon.
Attest,

.....
Clerk.

No. 5.

The Same — Another Form of Order of Notice by Publication and Attachment by Trustee Process.

COMMONWEALTH OF MASSACHUSETTS.

MIDDLESEX, SS.

Superior Court.....A. D. 190 .

UPON THE libel aforesaid, it is ordered by the Court that the Libellant notify the Libellee to appear before our Justices of said

Court, at.....in said County, on the first Monday of.....
next,

.....
by causing an attested copy of said libel and of the order of the Court
thereon, to be published in the....., a newspaper
published in.....in the County of....., once a week,
three weeks successively, the last publication to be.....days
at least before the said last mentioned day, that he may then and
there show cause, if any he ha , why the prayer in said libel set
forth should not be granted. And the officer serving this precept is
ordered to attach the goods and estate of the said Libellee to the value
of.....dollars. And whereas the said Libellant says that
the said Libellee has not in his own hands and possession, goods and
estate to the value of.....dollars aforesaid, which can be come
at to be attached, but has intrusted to, and deposited in the hands
and possession of.....

.....
Trustee of the said Libellee's goods, effects and credits, to the said
value: WE COMMAND you, therefore, that you summon the said
Trustee , (if he may be found in your precinct) to appear
before our Justices of our said Court, to be holden as aforesaid, and
show cause, if any he ha , why execution to be issued upon such
judgment as the said libellant may recover against the said Libellee
in this libel (if any) should not issue against his goods, effects, or
credits in the hands and possession of the said Trustee .

And have you there this writ, with your doings thereon.

Witness, ALBERT MASON, Esquire, at Cambridge, the.....
day of.....in the year of our Lord one thousand nine
hundred.....

.....,

Clerk.

No. 6.

Order for Attachment of Real and Personal Property and Attachment by Trustee Process.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.

In Superior Court, Boston,.....A. D. 1900.

And in order to secure to the libellant (and to such children as may be committed to her care and custody) a suitable support and maintenance, the Sheriffs of our several counties, or their Deputies, or either of them, are hereby directed to attach on said libel the real or personal estate of said.....to the amount of dollars conformably to the Statutes in such case made and provided.

And whereas the said libellant says that the said..... has not in his own hands and possession goods and estate to the value aforesaid which can be come at to be attached, but has intrusted to and deposited in the hands and possession of.....

.....
Trustee of the said.....goods, effects, and credits to the said value, it is ordered that the officer serving this order, summon the said supposed Trustee , if he may be found in his precinct, by serving h m with a true copy of said libel and this order thereon fourteen days before said..... to appear before the Justices of said Court, to be holden as aforesaid, to show cause (if any h have) why execution to be issued on such decree as the said Court may pass should not issue against the goods and effects of said.....in the hands and possession of the said supposed Trustee .

.....
Clerk.

No. 7.**Attachment Clause.**

R. L., ch. 152, secs. 10 and 11.

If an attachment of the husband's property is required, on a libel filed by the wife, insert in the prayer, "and that the real and personal estate of the said.....may be attached to the value of.....dollars in order to secure a suitable support and maintenance to your libellant and such children as may be committed to her care and custody."

No. 8.**Custody of Children.**

R. L., ch. 152, secs. 25 and 26.

When the libellant desires the care and custody of the minor children of the marriage, insert in the prayer, "and that the care and custody of their two (or as the number may be) minor children, namely.....and....., may be given (or decreed) to h during the pendency of this libel and afterwards."

No. 9.**The Same — Custody of Children.**

Or, insert in the body of the libel, just before the prayer, "and your libellant further represents that there have been born of this marriage two children, who are both still living, and whose names and respective dates of birth are as follows: George Smith, born April 14, 1897, and Mary Smith, born December 7, 1899;" and then insert in the prayer, "and that the care and custody of said minor children be given to your libellant during the pendency of this libel and afterwards."

No 10.**Decree — Custody of Children.**

And it is further ordered, etc., that the libellant, according to the prayer of her libel, be entitled to and charged with the custody, care, and education of the infant son of the parties mentioned in the pleadings; provided always, that this order for the custody, care, and education of the said infant may at any time hereafter be modified, varied, or annulled upon sufficient cause shown.

Chancellor Kent in *Barrere v. Barrere*, 4 Johns. Ch. 187.

No. 11.**Decree — Allowance for Support of Children.**

And it is further ordered, etc., that the libellee pay to the libellantdollars a year, to be computed from the date of this decree, in equal quarterly payments, to be applied towards the support and maintenance of the minor son of the parties, and that this allowance is to continue until further order, and be subject to variation as future circumstances may require.

No. 12.**Maiden Name.**

R. L., ch. 152, sec. 20.

If the wife wishes to resume her maiden name, or the name of a former husband, insert in the prayer, "and that your libellant may be allowed to resume her maiden name of A. ;" or, "the name of B., being that of her former husband."

Note. — It is not necessary to allege the libellant's maiden name unless there is a prayer that such name be restored to her.

No. 13.**Restitution of Property to the Wife.**

P. S., ch. 146, sec. 24.

If the wife desires the return of her property, insert in the prayer the following: "that she may be restored to her real estate, and to the personal property which came to her said husband by reason of said marriage."

Or the following: that the said C. B. and the said A. B. in her right hold in fee simple, real estate of the value of \$., within this commonwealth; that by reason of the said marriage the said C. B. has received personal estate to the value of \$.; that the said C. B. is seized in fee in his own right of a valuable real estate, situated within this commonwealth, and owns and has a large and valuable personal estate, to wit, of the value of \$., besides the personal estate which he received by reason of said marriage; wherefore the libellant prays that all the personal estate which he received by reason of said marriage, or a sum of money equal in value to the whole of the same personal estate, may be assigned to her for her own use.

No. 14.**Alimony Pendente Lite and Counsel Fees.**

R. L., ch. 152, sec. 14.

Motion. — Now comes the libellant, and moves that the libellee pay into court a reasonable sum for the payment of expenses incurred and to be incurred by the libellant in preparing and prosecuting the above entitled suit, and for the fees of her counsel, and a further sum for the maintenance and support of the libellant during the pendency of the libel.

No. 15.

Alimony, Pendente Lite and Counsel Fees. Petition — Wife Plaintiff.

The petition of the above named.....respectfully shows:

I. That she has brought this action against the libellee, her husband, for a divorce upon the ground of (naming it), as more fully appears by the libel in said cause.

II. That the suit has been actually commenced by the service, on the libellee, on the.....day of....., 19 , of the summons and a copy of the libel; that he has appeared and answered, denying all the material allegations of the libel; but that all said allegations are nevertheless true, as your petitioner is informed and believes; and she will be able to substantiate them by proof on the trial, and has a good cause of action therein, as she is advised by her counsel, and as she verily believes.

III. That your petitioner is wholly destitute of the means of supporting herself pending this action, or of carrying on the action, and defraying the costs and expenses attending the same.

IV. That the said.....has real estate and personal property to a large amount, and amply sufficient to enable him to advance therefrom to your petitioner such sums as may be necessary for the above mentioned purposes. Your petitioner is informed and believes that the said.....is the owner of property to the amount of more than.....dollars; and that his annual income is about.....dollars, and (add any other facts as to the husband's profession, the number and age of children, etc., which bear on the question of his ability).

Your petitioner therefore prays that the said.....may, by an order of this court, be required to pay to your petitioner a reasonable sum for her support and maintenance during the pendency of this action, and such sums as may be necessary to enable your petitioner to carry on this action, and to defray the necessary costs and expenses thereof; and for such other and further order as may be just.

No. 16.

Alimony, Pendente Lite and Counsel Fees. Petition — Wife Defendant.

I. That the above named libellant,, has commenced an action, by the service of a summons and copy of the libel on your petitioner, to obtain a divorce from the bonds of matrimony, and that your petitioner has answered denying all the material allegations in said libel, except the allegation as to the marriage between this petitioner and said libellant.

II. That your petitioner is wholly destitute, wherefore she prays that the said.....may, by an order of this court, be required to pay to your petitioner a reasonable sum for her support and maintenance, during the pendency of this action, and such sums as may be necessary to enable your petitioner to maintain her defense, and to defray the necessary costs and expenses thereof; and for such other and further order as may be just.

 No. 17.
Alimony.

R. L., ch. 152, sec. 30.

A clause may also, in a proper case, be inserted in the prayer, asking for alimony, substantially as follows: "and that such alimony out of his estate may be decreed to her as seems just and reasonable;" or, "that he may be required to pay to your libellant such alimony as seems just and reasonable;" or, "that suitable alimony may be also decreed to be paid to her by her said husband at such times as to the Court shall seem proper."

No. 18.**Petition to Enforce Payment of Alimony.**

R. L., ch. 152, secs. 31 and 32.

First allege the original decree in the petitioner's favor, that certain instalments are overdue and unpaid notwithstanding demand therefor, that the husband is of sufficient ability to make the payments, which he has refused to do:

Wherefore she says that the said.....stands in contempt of this Court, and she prays that the decree directing the said payments may be enforced, in the same manner as decrees in equity are enforced, to wit, that a writ of attachment may issue against said.....so as to have his body before the court at such time as the court may direct, to answer touching the contempt he has committed against said Court; and also that the said.....may be required to give to her sufficient security for the said payments hereafter, according to the terms of the decree; and for such other order and decree as may seem fit in the premises.

Precedent in *Slade v. Slade*, 106 Mass. 499.

No. 19.**Modification and Annulment of Decree. Petition to Increase Alimony.**

R. L., ch. 152, sec. 33.

Respectfully represents Jane Roe, of Boston, in the county of Suffolk, and Commonwealth of Massachusetts, that she was formerly the wife of John Doe, of said Boston, and was divorced from the bonds of matrimony on the twenty-fourth day of September, 1892, by this court, at a sitting of said court holden at said Boston, within and for the county of Suffolk, and that on the said judgment of divorce it was further ordered and decreed by said court that the

custody of their two youngest children be given to the mother, and that the said John Doe pay to the said Jane the sum of..... dollars for five successive years.

Your petitioner further represents that said children have always lived with her, and are much attached to her, and that she desires to have them continue with her during their minority; that the five years mentioned in said decree expired on the twenty-fourth day of September, 1897.

Your petitioner further represents that the.....dollars per annum in said judgment has been fully paid, and that the said John Doe is possessed of much property, as follows, to wit: (describing it), but that the property of your petitioner is nearly exhausted, consisting only of the following property, to wit: (describing it).

Wherefore your petitioner prays the court may so far alter its decree as to order the said John Doe to pay your petitioner such reasonable sum towards the support and education of her said two children during their minority as upon examination justice may require.

No. 20.

To Decrease Alimony.

R. L., ch. 152, sec. 33.

That the petitioner and the respondent were duly married on the fourth day of November, 1863; that two children, the issue of said marriage, were born to the petitioner and the respondent; that in October, 1881, the petitioner filed a libel in this court against the respondent praying for a divorce on the ground of desertion, and that, on the fourth day of November, 1882, a decree of divorce was duly entered in his favor on the ground of desertion, but that said decree ordered the petitioner to pay the respondent alimony as follows, to wit: eighty dollars at the time of said decree; five hundred dollars on the first day of December, 1882; and five hundred dollars on the first day of December, 1883. The petitioner has paid said sums of eighty dollars and five hundred dollars, being all of said

alimony that has become due under the decree up to the date of the filing of this petition.

The petitioner further says that the respondent brought no property to him at their marriage, nor during coverture, and added nothing at any time excepting some articles of furniture, pictures, jewelry and clothing, all of which she took away with her when she abandoned him; that no property was accumulated by their joint labor; that when the respondent abandoned the petitioner, she took with her a piano and various articles of personal property, all of which she still keeps and uses; that in said decree no order was made as to the custody of the children, and that neither of the children is dependent on the respondent for support.

The petitioner also says that since the granting of said decree of divorce, to wit, on the eleventh day of January, 1883, the respondent intermarried with one....., and is now living and cohabiting with him at.....; that said..... has ample means to support and maintain the respondent in such manner as she in her condition of life has been heretofore enjoying; that the respondent knew all these things, and the pecuniary condition of said..... before she married him, and that by reason thereof, the respondent is no longer dependent on the said alimony for her support and the object for which the same was granted has ceased by reason of the marriage aforesaid, and the respondent, with full knowledge of all the facts, has voluntarily abandoned the same and all its provisions and benefits, and the petitioner is absolved from the further payment of any portion of said alimony remaining unpaid.

Wherefore the petitioner prays that the respondent be prohibited from collecting the remaining instalment of said alimony, and that on final hearing the unpaid instalment be set aside or modified, as the court may deem proper, and for such other relief as is just.

Note. — The remarriage of the wife is *prima facie* cause for reducing the alimony to a nominal sum. *Southworth v. Treadwell*, 168 Mass. 511; *Albee v. Wyman*, 10 Gray, 222; *Sidney v. Sidney*, 4 S. & T. 178; *Bowman v. Worthington*, 24 Ark. 522; *Olney v. Olney*, 43 Ohio St. 499; *Bankston v. Bankston*, 27 Miss. 692.

No. 21.

Writ of Scire Facias to Enforce Alimony Against an Executor.

ESSEX, ss.

To the Sheriffs of our several Counties or their Deputies, Greeting:

Whereas, Ann Knapp, of Newburyport, in our county of Essex, before our Justices of our Superior Court holden for and within our said county of Essex, at Salem, on the first Monday of June, in the year of our Lord one thousand eight hundred and eighty-eight, was granted an absolute divorce from the bonds of matrimony from Isaac Knapp, then of Newburyport aforesaid, and was allowed the sum of two hundred dollars by the year as her reasonable alimony, to be paid to her by the said Isaac Knapp in quarterly payments, to be computed from the twenty-seventh day of June, A. D. 1888, and at a term of said court held at said Salem on the first Monday in June, A. D. 1889, it was considered by the court that the alimony of the said Ann Knapp be increased to two hundred and fifty dollars a year, to be paid to her by the said Isaac Knapp in quarterly payments, the first quarter to be computed from and after the twenty-seventh day of June, A. D. 1889, and decrees to the said effect were duly entered, whereof the said Isaac Knapp is convict, as to us appears of record; and although said decrees are thereof entered, yet no portion of the same has yet been paid or satisfied; and whereas the said Isaac Knapp died at Winchester in our county of Middlesex on the 25th day of October, A. D. 1899, possessed of goods and estate, and leaving a will whereof Sophia Knapp of said Winchester, is named as executrix, which will was on the 21st day of December, A. D. 1899, duly admitted to probate in said county of Middlesex, and the said Sophia Knapp appointed executrix, who duly gave bond as such which was approved by the court, yet the said executrix has, although a year and more has elapsed since said appointment and qualification, failed to pay said arrears of alimony, but refuses to pay the same, or any part of the same; whereof the said Ann Knapp has made application to us to provide remedy for her in that behalf.

Now, to the end that justice be done, we command you that you make known unto the said Sophia Knapp, executrix of the will of said Isaac Knapp, that she be before our Justices of our said Superior

Court to be holden within and for said county of Essex, at Salem, on the first Monday of October next to show cause, if any she has, wherefore the said Ann Knapp ought not to have an execution against the goods and estate of the said Isaac Knapp in her hands for the arrears of alimony, so decreed aforesaid, and further to do and receive that which our said court shall there consider; and there and then have you this writ with your doings therein.

Witness, A. M. Esquire, at Salem, this eleventh day of July,
in the year of our Lord one thousand nine hundred and
one.

[SEAL.]

E. B. G., *Clerk.*

Precedent in Knapp v. Knapp, 134 Mass. 353.

No. 22.

Petition for Contempt — Non-payment of Alimony.

SUPERIOR COURT,
DIVORCE SESSION.

Now comes Mary Smith, the libellant in the above case, and says that on February 8, 1901, a decree for alimony was entered requiring the libellee to pay to the libellant \$. forthwith, and the further sum of \$. on the first secular day of each and every month thereafter until the further order of the Court; that the libellee has not made said payments as required by the decree.

Wherefore the libellant moves that the libellee, John Smith, be summoned into Court to show cause why he should not be adjudged in contempt.

MARY SMITH.

SUFFOLK, SS.

Feb. 26, 1901.

Personally appeared the above named Mary Smith and made oath that the statements above subscribed by her are true so far as the same depend on her own knowledge, and that so far as the same depend on information and belief she believes them to be true.

Before me,

.....,

Justice of the Peace.

No. 23.**Order of Notice on Petition for Contempt for Non-payment of Alimony.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.

SUPERIOR COURT, Feb. 28, A. D. 1901.

On the foregoing petition it is ordered, that the petitioner give notice to the respondent, John Smith, to appear at the Equity Session, First Division, of said Court, at the Court House in Boston, in said County of Suffolk, on Friday, March 1, A. D. 1901, at 10 o'clock, A. M., by serving him with a true and attested copy of said petition with this order thereon, forthwith, that he may then and there show cause, if any, why said petition should not be granted.

By the Court,

J. A. W.,

Clerk.

No. 24.**Another Form — Petition for Contempt — Non-payment of Alimony.**

To the Honorable the Justices of the Superior Court, holden at
Boston, within and for the County of Suffolk,

Respectfully represents Abigail Slade of Quincy, in the County of Norfolk, wife of James Slade, now commorant of Boston, in the County of Suffolk, but, as the said James affirms, domiciled in the State of Maine, that at said Boston, on the 13th day of April, A. D. 1898, by a decree of this Court, rendered in a libel for divorce brought by your petitioner against the said James, she was divorced from the said James Slade; and that it was thereupon ordered and decreed by the Court that the said James Slade shall pay to the said Abigail the sum of six hundred dollars per annum, as alimony, and in equal quarterly payments from and after the first day of July then next ensuing, the first payment to be made on the said first day of July.

And she further says that the eighth quarterly installment ordered by said decree became due and payable on the first day of April last past, and the ninth on the first day of July last past, and the tenth on the first day of October current; and that said three installments are all unpaid, and amount together to the sum of four hundred and fifty dollars. And she further says that she has demanded payment of the said James of the said installments; but that, although able to pay the same, he persistently neglects and refuses so to do, although the decree still stands unreversed and in full force, as by the record thereof remaining in said Court will fully appear; wherefore she says that the said James Slade stands in contempt of this Court in the premises. Wherefore your petitioner prays that said decree directing the said payments to be made to your petitioner may be enforced in the same manner as decrees in equity are enforced; to wit, that a writ of attachment may issue against said James Slade so as to have his body before said Court at such time as the Court may direct to answer touching the contempt he has committed against said Court; and also that the said James Slade be required to give to her sufficient security for the said payments, according to the terms of said decree hereafter; and for such other order and decree as to your honors may seem fit in the premises.

Must be signed and sworn to personally by the petitioner.

Precedent in *Slade v. Slade*, 106 Mass. 499.

No. 25.

Prohibiting Restraint of Wife's Liberty.

R. L., ch. 152, sec. 15.

If the wife desires to have her husband prohibited from interfering with her personal liberty, insert in the prayer the following:

“And she also prays that the libellee be prohibited and enjoined from imposing any restraint on her personal liberty during the pendency of the libel.”

No. 26.

Allegation of Domicil and Jurisdictional Facts.

“ And thereafterwards your libellant and the said have never lived together as husband and wife in this Commonwealth, but the said libellant has lived and resided in this Commonwealth for more than five consecutive years next prior to the filing of this libel.”

Or, “ and thereafter your libellant and the said have never lived together as husband and wife in this Commonwealth, but the said libellant has lived and resided in this Commonwealth for more than three consecutive years next prior to the filing of this libel, and both the libellant and the libellee were inhabitants of this Commonwealth at the time of their said marriage.”

Note. — The general rule is that no divorce shall be decreed if the parties have never lived together as husband and wife in this Commonwealth. If, however, the libellant has resided in the Commonwealth for five years next preceding the filing of the libel, or, if the parties were inhabitants of the Commonwealth at the time of the marriage, when the libellant has been such an inhabitant for three years next preceding such filing, a divorce may be decreed for any cause allowed by law. The court will not have jurisdiction unless the above allegations are contained in the libel, according to the circumstances of the particular case. R. L., ch. 152, sec. 5.

See *Harteau v. Harteau*, 14 Pick. 181; *Burlen v. Shannon*, 115 Mass. 448.

No. 27.

Adultery.

R. L., ch. 152, sec. 1.

“ At on or about the day of , A. D. 19 , committed the crime of adultery with one A . . . B. ; ” or, if the name of the particeps criminis is not known, say, “ with a certain person whose name is to your libellant unknown.”

No. 28.**Adultery with Specific and General Allegations.**

“On or about the.....day of....., A. D. 19 , ataforesaid, committed the crime of adultery with a person to your libellant unknown, but by information of the name of D.....; and on or about the.....day of....., A. D. 19 , at.....in this Commonwealth, committed the crime of adultery with some person to your libellant unknown; and, at the same time and place to your libellant unknown, committed the crime of adultery with one E.....; and on divers other days between her said marriage with him and this date, committed the crime of adultery with divers lewd women to your libellant unknown.”

No. 29.**The Same.**

“That at various times during the months of April and May, 1894, the libellee, at the City Hotel in the city of Boston, State of Massachusetts, committed adultery with a woman whose name is unknown to the libellant.”

No. 30.**The Same.**

“That, at divers times between the 1st day of May, 1895, and the filing of this libel, and at divers places in said city of Boston, but at what particular times and places the libellant is unable more particularly to state, the said libellee has committed adultery with James C....., and Harry B....., and with other men whose names are unknown to the libellant.”

No. 31.**Impotency of Husband.**

R. L., ch. 152, sec. 1.

That immediately after said marriage took place your libellant discovered that the said John Doe, at the time of his intermarriage with your libellant as aforesaid, was, and has continued to be, naturally impotent and physically incapable of entering the marriage state; that the said John Doe has a malformation of his parts of generation, so that the said marriage could not be consummated by the sexual intercourse of the parties, and that said physical incapacity of the libellee as aforesaid was well known to the libellee at the time of contracting said marriage, but was unknown to the libellant. And your libellant further represents that she is informed and believes and therefore alleges that the said impotency and physical incapacity of the said John Doe still exists and is incurable.

No. 32.**The Same.**

That the libellee was at the time of his marriage with your libellant, and ever since has been subject to a permanent and incurable corporal impotency which renders sexual intercourse impossible, which fact the libellee at all times prior to their marriage concealed from the libellant who had no knowledge of said impotency.

No. 33.**Impotency of Wife.**

R. L., ch. 152, sec. 1.

That soon after said marriage was celebrated, the libellant discovered that the libellee, at the time of her marriage with the libellant as aforesaid, was impotent in this, that the mouth of the vagina of the

said Jane was and still is closed, so as to prevent copulation; that said physical incapacity of the libellee as aforesaid was well known to the libellee at the time of contracting said marriage, but was unknown to the libellant, and that the libellant has been informed and believes and therefore alleges that said physical incapacity of the libellee still exists and is incurable.

No. 34.

The Same.

(Precedent in *Merrill v. Merrill*, 126 Mass. 228.)

That the said Hannah A. Merrill on the eleventh day of December, A. D. 1867 (the date of the marriage), and at all times subsequent thereto, was and still is impotent and wholly incapable of performing the act of generation, or of being carnally known by any man; and that your libellant, at the time of said marriage, and at all times since up to the present time, was and still is sound and wholly competent to the performance of all the duties of a husband.

Note. — This form is copied from the original papers in the case of *Merrill v. Merrill*, 126 Mass. 228, in which case it appeared that the parties had occupied the same bed for a period of ten years, both being in good health; that the marriage had never been consummated by any act of sexual intercourse; that the husband had often tried to have intercourse with his wife, but she utterly refused to permit it, giving no reason for her refusal; that the husband did not know that the wife was physically incapable of the act of sexual intercourse; and that the wife refused to submit to an examination as to her physical capacity. A female witness testified that the wife had said to her that she “could not have connection with any man,” but gave no reason or explanation why she could not. Held that this statement of the wife, taken together with the other evidence, would justify a finding that the charge in the libel was proved; and that a ruling that the evidence would not in law justify such a finding was a subject of exception.

This case was subsequently heard upon the same evidence, and the libel was dismissed. It will be observed that there is no averment in this form that the impotency was *incurable*; a material fact which unquestionably must not only be alleged in the libel, but proved at the trial. The form is undoubtedly defective for failure to allege that the impotency is incurable.

There are, however, decisions in other states that the libel need not allege the impotency to be incurable, as the term impotent *ex vi termini* signifies incurability.

No. 35.

The Same.

That at the time of the marriage the libellee was and has continued to be wholly incapable of consummating the marriage by reason of the (state here the nature of the incapacity, as, malformation of her parts of generation, or the frigidity and impotence of his parts of generation), and that such incapacity is incurable.

The ecclesiastical precedents are not adapted to our practice by reason of their prolixity.

Forms of libel for a divorce on the ground of impotency as used in the ecclesiastical courts may be found in Coote Ec. Pract. 370, 376, 385, 386, and in *Serrell v. Serrell*, 2 Swab. & T. 422, 423.

No. 36.

Cruel and Abusive Treatment.

R. L., ch. 152, sec. 1.

After the words "being wholly regardless of the same," unless the date can be stated, say, "has been guilty of cruel and abusive treatment towards her;" and, if a specification is advisable, add, "and particularly on the.....day of.....last, inflicted blows upon her person, and beat and bruised her, to her great injury;" or "and then and there was guilty of divers other acts of cruel and

abusive treatment, to the libellant to her great injury;" or vary the form to suit the particular case.

Note. — In *Ford v. Ford*, 104 Mass. 198, the libel alleged that the libellee "has been guilty of extreme cruelty towards her, and particularly on the 23d day of September last inflicted upon her person blows, and then and there did divers other acts of extreme cruelty, to her great injury." The court held that this amounted to a specification of the infliction of blows on a single occasion, and that evidence of previous similar independent instances of ill treatment and misconduct on other occasions was properly excluded as an independent ground of divorce, because it was not pertinent to the issue which the libellant had chosen to raise by her allegations. The cause could not be tried on allegations not made. It would not be in conformity with the rules of pleading, nor just to the libellee, who was entitled to have the matter relied upon set forth, at least by some general allegations, so that he could be prepared to meet them. If the allegations had been general, he might have moved for specifications, if necessary; but as the allegations were limited to a single specified act, he needed no further specifications, and was bound to meet merely that charge. See *Commonwealth v. Elwell*, 1 Gray, 463; *Commonwealth v. Purdy*, 146 Mass. 139. The words "extreme cruelty" contained in the Pub. Sts. ch. 146, sec. 1, have been omitted from the R. L. ch. 152, sec. 1. "Cruel and abusive treatment" is now the language of the statute.

No. 37.

Cruel and Abusive Treatment.

R. L., ch. 152, sec. 1.

At.....on or about the.....
day of.....A. D. 19.., and on divers other days
and times, was guilty of cruel and abusive treatment towards your
libellant."

No. 38.**Habits of Intoxication.**

R. L., ch. 152, sec. 1.

“Has contracted gross and confirmed habits of intoxication.”

Note. — The general language of the statute is sufficient as is evident from the original papers in *Blaney v. Blaney*, 126 Mass. 205, in which case it was held that evidence that a husband had been grossly intoxicated as often as three or four times a year for a period of twelve or fifteen years, and remained in that condition from seven to ten days on each occasion; that at such times he went or was sent to an asylum for inebriates; that when the desire for drink came upon him he could not resist; that a single glass of liquor would bring on excessive drinking and a renewal of gross intoxication; that there had been no apparent improvement in his habits in this respect, and that any undue excitement made him drink, is sufficient to justify a finding that he had contracted such gross and confirmed habits of intoxication as entitled the wife to a divorce.

It is not necessary to specify more definitely the facts constituting gross and confirmed habits of intoxication; the charge itself implying that the libellee has a persistent habit of becoming intoxicated from use of strong drink, and thus rendering the marital relation disgusting and intolerable.

No. 39.**Drunkenness Caused by Drugs.**

St. 1889, ch. 447. R. L., ch. 152, sec. 1.

“Has been guilty of gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs.”

Note. — It is obvious that this form may be varied so as to include under the words “other drugs,” morphine, chloral, cocaine, or any drug the excessive use of which will cause gross and confirmed drunkenness.

No. 40.**Desertion.**

R. L., ch. 152, sec. 1.

“At.....on the.....day of
.....A. D. 19.., (or in the month of.....
A. D. 19..) utterly deserted h., and has continued such desertion
from that day (or time) to the date hereof, being more than three
consecutive years next prior to the filing of this libel.”

Note. — A libel for divorce for desertion, under the statute, cannot be maintained by the *deserting* party, although the desertion was caused by the misconduct of the other party. *Padelford v. Padelford*, 159 Mass. 281 (under P. S. 146, 1; R. L. ch. 152, sec. 1); *Fera v. Fera*, 98 Mass. 155; *Pidge v. Pidge*, 3 Met. 257 (under St. 1838, ch. 126).

No. 41.**Refusal and Neglect to Provide.**

“Being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide a suitable maintenance for her.”

Note. — When a husband has abandoned his wife without means of support, under circumstances of cruelty sufficient to justify a divorce, though the desertion has not continued for three years next prior to the filing of the libel, it may be pleaded as a fact having some bearing on the issue. The necessary allegations are the following:

No. 42.**Desertion and Refusal to Provide.**

On or about the.....day of.....
A. D. 19.., utterly deserted her, and, being of sufficient ability, did grossly, wantonly, and cruelly refuse and neglect, and ever since to the date hereof, has so refused and neglected to provide a suitable maintenance for her.”

No. 43.**The Same.**

"At.....aforesaid, on the..... day of.....A. D. 19.., did utterly desert your libellant, and, being of sufficient ability, did on said..... day of.....grossly, wantonly and cruelly refuse and neglect to provide a suitable maintenance for her, and has continued such refusal and neglect up to the date of this libel."

Note. — A libel by a wife charging that her husband had grossly or wantonly and cruelly refused and neglected to provide a suitable maintenance for her, he being of sufficient ability, sufficiently sets forth the cause of action. *Brown v. Brown*, 22 Mich. 241.

No. 44.**Imprisonment.**

R. L., ch. 152, sec. 1.

"That the libellee on.....19.., was sentenced by the Superior Court in.....county and Commonwealth of Massachusetts to confinement at hard labor for life (for.....years) in the (jail or house of correction) State prison at.....in the county of..... for the crime of....."

Note. — The imprisonment must be for five years or more. *Oliver v. Oliver*, 169 Mass. 592.

The statute requires imprisonment "in the State prison," and does not permit divorces for imprisonment in other states. *Leonard v. Leonard*, 151 Mass. 151; 23 N. E. 732; 21 Am. St. Rep. 437; 6 L. R. A. 632.

No. 45.**The Same.**

That on the.....day of.....
 and at the.....term of the.....court
 of.....county, the libellee was duly convicted of
 the crime of....., and was thereupon sentenced
 by said court to confinement in the.....of the
 Commonwealth of Massachusetts for the period of.....
 years, that the libellee is now confined in said.....in
 pursuance of said sentence, which now remains in full force and
 effect, and that no proceedings to reverse said sentence are now
 pending.

No. 46.**For Several Causes.**

“ On divers occasions has cruelly and abusively treated her; that he has gross and confirmed habits of intoxication; that being of sufficient ability, he grossly and wantonly and cruelly refuses and neglects to provide a suitable maintenance for her; and that he has been guilty of gross and confirmed drunkenness caused by the voluntary and excessive use of opium and other drugs.”

Note. — A libel alleging more than one ground for divorce is not for that reason defective for multifariousness. *Young v. Young*, 4 Mass. 430.

No. 47.**Marriage Annulled for Fraud — Venereal Disease.**

R. L., ch. 151, sec. 11.

Respectfully libels and represents that on the twentieth day of August, A. D. 1894, your libellant was married to Ariel Smith, the libellee, at Lowell aforesaid; that on the same day after said marriage

ceremony was performed as aforesaid, and before the same was followed by cohabitation between the parties thereto, your libellant for the first time received information that the libellee for a long time had been and then was constitutionally affected with and suffering from a venereal disease known as the syphilis, an incurable malady, in its character exclusively contagious.

Your libellant further says that she at once on the same day took measures to ascertain the truth of the information received by her as aforesaid, and she learned that the same was true; she then refused to cohabit with the said Ariel Smith, and then and there deserted him, and has continued such desertion and to live separate and apart from him from that time until the date hereof.

Your libellant further charges that the said libellee in inducing her to contract said marriage with him gave her no information whatever on the subject of his diseased condition, and represented to her that he was enjoying good health and was also virtuous; that the deception so practiced was a fraud on her, and had she known that the libellee was suffering from said disease she would not have contracted said marriage; that by reason of said fraud and deception so practiced on her the said marriage, though regular in form, was null and utterly void.

Wherefore she prays that by decree of this honorable court the said marriage may be pronounced to be, and to have been, at and from the time of its celebration null and void, and that such further relief may be granted to your libellant in the premises as to right and law may pertain.

Dated, etc.

This form is copied from the original papers in the case of *Smith v. Smith*, 171 Mass. 404, in which case the decree in favor of the libellant was affirmed by the Supreme Court.

No. 48.

The Same — Pregnancy Before Marriage.

That the libellee, in order to induce the libellant to enter into said contract of marriage, falsely represented to the libellant that she was chaste and virtuous, and physically competent to marry, but that in

fact she was not chaste and virtuous, and physically competent to marry, but was at that time pregnant by some other man than the libellant; that she concealed said fact from the libellant, in consequence of which false representation and concealment the libellant was induced to enter into said marriage, and that immediately upon the discovery of said facts, the libellant ceased to cohabit with the libellee, and has not since cohabited with her.

No. 49.

The Same — Pregnancy Before Marriage.

To the Honorable, etc.

Michael Reynolds of.....respectfully shows that by means of the false, fraudulent and deceitful representations hereinafter mentioned, he was induced to marry and did marry Bridget Reynolds of.....on the eleventh day of October, 1856, and was so married by the Rev. Horace James; that at the time of said supposed marriage, your libellant was only seventeen years of age, while the said Bridget was thirty years old or more; that previous to said supposed marriage he had been acquainted with and known said Bridget for about six weeks only; that during all the time your libellant was acquainted with her she represented herself and told the libellant that she was a chaste and virtuous woman; that as far as your libellant then knew she was so; that the friends with whom she then lived also represented to your libellant, at her procurement and with her knowledge, that she was a good, honest and virtuous woman, that nothing could be said against her, and that your libellant relying upon such representations, was married as aforesaid. Whereas in truth and in fact she was not a virtuous woman, but, at the time of said supposed marriage was pregnant by some person to your libellant unknown with a child of which she was delivered on or about the seventeenth day of March, A. D. 1857, which she admitted and confessed was not the child of your libellant, and that after the birth of said child your libellant has not lived or had any intercourse with her. Wherefore your libellant prays that

the marriage aforesaid between himself and said Bridget may be declared null and void, because the same was procured by said fraudulent and false representations and by reason of said fraud so practiced upon him.

Precedent in *Reynolds v. Reynolds*, 3 Allen, 605.

Note. — The demurrer to this libel was overruled, and the court held that it set out a valid and sufficient ground for a divorce or decree of nullity of marriage.

No. 50.

Divorce Annulled — On Ground of Fraud in Procuring Decree.

Respectfully represents George Spinney of Somerville, in the county of Middlesex and Commonwealth of Massachusetts, that he was lawfully married to one Angie Oliver, of said Somerville, on the twenty-sixth day of June, 1868, and that they continued to live and cohabit together in said Somerville until the third day of September, A. D. 1888, when this respondent deserted your petitioner as hereinafter set forth.

Your petitioner further says that since their said marriage he has always conducted himself as a faithful, temperate, and affectionate husband, and has ever been faithful to his marriage vows and obligations, but that said respondent has been unmindful of the same, and on the third day of September, A. D. 1888, without any justifiable cause, deserted said petitioner and her family in said Somerville, and since that time has remained away from said petitioner and her home and family, although frequently requested by said petitioner to return to him and her marriage relations.

Your petitioner further represents that on the 21st day of July, A. D. 1891, the said respondent, then residing in Lakeville, in our county of Plymouth, still further intending to injure and disgrace your petitioner, did sue out of the office of the clerk of this court a libel for divorce from the bonds of matrimony between her and your petitioner; that said respondent set forth in said libel certain false and malicious charges against your petitioner as will more fully appear

on the record of this court; that your petitioner long before and ever since his marriage with this respondent has been a resident of said Somerville; that during some portion of each year, both before and after said respondent deserted her home in said Somerville, he has been temporarily absent from the Commonwealth in the vicinity of Portland, Maine, engaged in his business of a traveling salesman, but has always kept his home, and his last and usual place of abode in said Somerville; that on the 21st day of July, A. D. 1891, he was still a resident of said city, all of which facts were well known to this respondent, or could have been ascertained by her by the use of reasonable diligence; yet this respondent, though well knowing the facts aforesaid, and well knowing the residence of your petitioner, but intending to injure said petitioner, and to avoid having him served with a copy of said libel; and to deceive and defraud this Honorable Court, did on the said 21st day of July, A. D. 1891, allege in her said libel and afterwards make oath at the trial, that she had used reasonable diligence to ascertain the residence of the petitioner, but was unable to do so, and did not know where it was; and that in consequence thereof no service by copy of the libel was made upon the petitioner, but notice by publication was ordered by said court, and thereupon in order further to injure the petitioner, and to prevent his having any knowledge of the pendency of said libel, the respondent caused said notice to be published in the "Lakeville Register," a newspaper published in Lakeville in the county of Plymouth, the respondent well knowing that said newspaper was merely of small local circulation, and would not come to the notice of the petitioner or any of his friends in said S.

Your petitioner further alleges that said libel was duly entered in said Superior Court on the.....day of..... A. D. 19 , and by means of the false oath aforesaid, and of the fraudulent and deceitful practices above described, the petitioner had no knowledge or information of the pendency of the same, and on the.....day of....., 19 , said libel was defaulted on the docket of said court, no appearance having been entered for the libellee, and on the.....day of19 , a divorce nisi was decreed this respondent for the alleged cause of gross and confirmed habits of intoxication, and refusal to support, which decree nisi was made absolute on the

.....day of.....19 , as fully appears by the records of this court.

Your petitioner further alleges that although his residence and last and usual place of abode had been in said Somerville, long before and ever since the libel was brought, as was well known to the respondent, yet no copy of the libel was ever served upon him; that he never saw the publication of the libel in said "Lakeville Register," and had no information or knowldge regarding the same; that he never had any knowledge or even suspicion that a libel had been brought by his said wife, or a divorce granted, until the.....day of.....19 , all because of the false and fraudulent oath and practices of the respondent as hereinbefore set forth, and that had he known of the pendency of said libel he would have resisted the same, and as he thinks, successfully.

Wherefore, inasmuch as great injustice has been done to your petitioner by said decree, and a willful fraud has been committed upon this court by the respondent, your petitioner prays that said judgment and decree of divorce so fraudulently obtained may be set aside, vacated and annulled.

No. 51.

The Same — For Fraud in Procuring the Decree.

That the petitioner and the respondent were married in Denmark, in the year 1879, and thereafterwards your petitioner and the respondent lived together as husband and wife in this Commonwealth, to wit, at said Boston; that for the purpose and with the intent of fraudulently procuring a divorce from the petitioner, and of preventing her from defending against the action for the same, the respondent, on the.....day of.....19 , persuaded the petitioner to return to Denmark, to remain for a year or two, for the benefit of her health, and in pursuance of said fraudulent intent, sent the petitioner to Denmark; that as a part of the same fraudulent scheme, and for the purpose of preventing the petitioner from returning to said Boston to defend such action, the respondent failed to furnish the petitioner with any money or funds

whatever after the month of September, 1892, and that she was then in Denmark without friends, relatives, or any means; that he thereupon commenced an action of divorce against her in the Superior Court in Suffolk county in this Commonwealth, alleging impotency as the ground of divorce, and caused the petitioner to be served in Denmark with the summons and a copy of the libel on the..... day of.....19 ; that on the copy of the libel there served on her was written the following statement, signed by the respondent, to wit:

“In case of divorce being granted in this action, I agree to pay and allow the petitioner, Jane Doe, the sum of twenty-five dollars per month, so long as she may need the same or remain single.

JOHN DOE.”

That nothing of the kind was ever attached to or made a part of the original papers; that the respondent made this a part of the copies of the papers so served on the petitioner for the fraudulent purpose of inducing her to believe that such allowance would be made her by the court, but in fact did never procure or intend to procure any order or judgment for any such allowance; that at the time of the service of the papers on her, she was not acquainted with the meaning of the term “impotent,” which the respondent well knew, and then fraudulently represented to the petitioner, by a letter written and sent to her, that the cause for which he was seeking such divorce was the barrenness of the petitioner, and no other cause; that she was thereby induced to believe that the fact that she was barren, and had born no children to him, was a sufficient ground for divorce in this Commonwealth; that she was then far from any person who sufficiently understood the English language to inform her, or who could inform her in any of these matters; that all these fraudulent artifices were practiced with the intent and for the purpose of inducing the petitioner not to defend said action for divorce, and by reason of the same she was induced not to defend said action; that on the..... day of.....19 , the petitioner being in default for want of an appearance and answer, the respondent appeared before the said Superior Court in Suffolk county, in this State, and after being duly sworn, testified that the petitioner was, and ever since said marriage had been, impotent and incapacitated for sexual intercourse; that all of said testimony was wholly false, as he then well

knew, and that she was never impotent; that thereupon the court ordered a decree nisi to be entered, which was made absolute on theday of.....19 , and was obtained by said perjury and said fraudulent acts and practices; that the petitioner arrived in this State on the.....day of.....19 , three days before commencement of this present action, and then for the first time learned that said action for divorce had been on the ground of impotency, and that no provision had been made for her support or maintenance by said judgment, and that since the.....day of.....19 , the respondent has contributed nothing to the petitioner's support except the sum of.....dollars.

Wherefore the petitioner prays that the said decree of divorce be set aside and held to be null, void and of no effect, and for other proper relief.

No. 52.

The Same — For Fraud in Procuring the Decree.

To the Honorable the Justices of the Superior Court:

Respectfully represents J. A. E., of New York, in the State of New York, that at a sitting of this court, held at New Bedford, within and for the county of Bristol, a decree was granted upon the libel of W. D. E., the husband of this petitioner, whereby a divorce, for the cause of adultery, was granted to said W. D. E., from the bond of matrimony heretofore existing between herself and said W. D. E., and the custody of the three minor children of your petitioner was likewise granted to said W. D. E.

That said W. D. E., in his libel, alleged that his residence was at Mansfield, in the said county of Bristol, and that the residence of your petitioner was to him unknown.

That upon the filing of said libel, September 1, 1866, notice was ordered to your petitioner, by publication in the "Union Gazette and Democrat," a newspaper published at Taunton; that no other notice was given to your petitioner, and that no appearance was made by her; all which more fully appears by the records of this court.

That the allegations of adultery in said libel contained against your petitioner are wholly false, and were and are known so to be to said W. D. E.

That said W. D. E. did not, at the time of filing said libel, nor at any time, ever live at Mansfield or elsewhere in said county of Bristol; and that, at the time of filing said libel, he well knew the residence of this petitioner in the city of New York, and the house in which she resided.

That said W. D. E. and your petitioner were married at Philadelphia, May 14, 1856, and removed to Brookline, in the county of Norfolk, in this Commonwealth, about Oct. 1, 1865, and there lived together as husband and wife until Feb. 4, 1866, where, for good and lawful cause, your petitioner left the said W. D. E., and has ever since lived in the family of her sister and brother-in-law in New York.

That at sundry times, while said parties were so living at said Brookline, said W. D. E. committed the crime of adultery with divers lewd women, and especially with one S. P.; that ever since June, 1866, said W. D. E. has lived, and, up to the time of the granting of said decree, was living in open adultery with said S. P., in said Brookline, at the house where your petitioner last resided with him; that said W. D. E. and S. P. were so living as part of the family of one H. E. B. and L. A. B., wife of said H. E. B.; that said S. P. was there known and called as "Mrs. E.," and as the reputed wife of said W. D. E.; and that said E. and S. P., and said H. E. B. and L. A. B. continued so to reside at said Brookline until about November 17, 1866, when they all absconded from the Commonwealth for parts unknown.

That said decree was granted solely upon the testimony of the said H. E. B. and L. A. B., to the effect that this petitioner had admitted to them that she was guilty of the crime of adultery, as alleged in said libel; that said testimony was utterly false; and that all the facts above alleged in this libel were well known to the said H. E. B. and L. A. B.

That said W. D. E., before filing his said libel, well knew that this petitioner was about to file a libel of divorce against him, to be made returnable in the county of Norfolk, in which county alone jurisdiction could be had of said suit; and that she had retained counsel

therefor; and that he could obtain no divorce from your petitioner if she should appear and oppose the same; and that your petitioner would appear and oppose any proceedings by him taken to procure a divorce, of which she should have notice.

That your petitioner believes that said W. D. E. filed his said libel in said county of Bristol, and falsely alleged his residence to be in said county; and that the residence of your petitioner was to him unknown; and procured said order of notice, by publication as aforesaid, solely with the design to procure said decree without notice to your petitioner, and to prevent her appearance to oppose said libel.

That she had in fact no notice or suspicion of the pendency of said libel, or of any of said proceedings of said W. D. E., until the twenty-fifth day of November, 1866, when she learned casually, by a newspaper published in Boston, that said decree had been made several days prior thereto.

Wherefore your petitioner alleges that said order of notice from this court, and the hearing upon said libel, and the said decree thereon, were obtained by a fraud practiced upon your petitioner and upon this honorable court, and without knowledge of this petitioner, and against right.

Your petitioner prays that said decree may be reopened, vacated, and declared to be null and void, and for such other and further relief as justice may require.

J. A. E.

SUFFOLK, ss.

December 4, 1866.

Then personally appeared the above named J. A. E., and made oath that the statements in the above petition contained are true.

W. G. R., *Justice of the Peace.*

Precedent in Edson v. Edson, 108 Mass. 599.

No. 53.

Vacating and Annulling Decree for Fraud.

(Precedent in Edson v. Edson, 108 Mass. 599.)

It is therefore ordered, adjudged and decreed that the decree heretofore made upon the libel of said William D. Edson, by this court,

held at New Bedford within and for the county of Bristol on the second Tuesday of November, 1866, whereby the bond of matrimony between said William D. and said Jane A. Edson was dissolved, and the custody of the minor children of said William D. and Jane A. Edson was given to said William D., be and the same is hereby vacated and annulled, in accordance with the prayer of said petition.

No. 54.

Decree of Nullity for Duress.

In the matter of Abram A. James v. Julia B. Smith, praying for a decree of this court that a certain marriage solemnized between the said parties may be declared void by a sentence of divorce or nullity, by reason of the same having been procured by fraud and duress; and upon the hearing of the evidence relating thereto the court find, that the same was obtained by duress and illegal restraint; this court does order and decree, that the said pretended marriage between the said parties be declared void and of no effect, and the same is hereby annulled to all intents and purposes.

For another form of decree of nullity, see *Fielding's Case*, 14 How. St. T. 1327-1369.

No. 55.

Decree of Nullity for Insanity.

The following form of the nullity decree was prepared by the Hon. Richard Fletcher while a judge of the Supreme Judicial Court for use in a cause then pending before him.

And now the said parties appearing, the said A. by M., his attorney and counsel, and the said X., otherwise called Y., by N., her guardian ad litem appointed by the court; and the court here, having fully heard the said parties, and having fully heard and considered their several pleas, proofs, and allegations, doth pronounce, decree, and declare that on the twenty-second day of August, in the year of our Lord one thousand eight hundred and forty-seven, a pretended

marriage was had and solemnized between the said A. and the said X., otherwise called Y., but that at the time of the solemnization of the said pretended marriage, she, the said X., otherwise called Y., was an insane person and incapable of making such a contract. Therefore, upon the reason above mentioned, the said court here doth hereby pronounce, decree, and declare that the said pretended marriage so had and solemnized between the said A. and the said X., otherwise called Y., was and is wholly and absolutely null and void, to all intents and purposes whatsoever. And the said court here doth hereby further pronounce, decree, and declare that the said A. was and is free from all bond of marriage with the said X., otherwise called Y.

No. 56.

Marriage Annulled — Evading the Statutes by Marrying in Another State.

R. L., ch. 151, sec. 10.

That on the.....day of.....
 a decree nisi of divorce was granted from.....to
his former wife, for the cause of adultery;
 that said decree nisi became absolute on the.....day
 of.....all of which appears of record in this
 court; that on the.....day of.....
 before the two years had elapsed from the entry of the final decree
 of divorce, and before the respondent.....could
 legally marry again, to wit., on the.....day of
the petitioner and the respondent, while they
 were both residents of this Commonwealth and intending to return
 and reside here, went into the State of.....and
 had their marriage solemnized in order to evade the laws of this Com-
 monwealth and afterwards returned and resided in this Common-
 wealth.

Note. — Observe that both parties must be residents of the Commonwealth, and both must intend to evade the law by going into another State or country and having their marriage solemnized there,

with the intention of returning to reside in this Commonwealth, and both must afterwards return and reside in the Commonwealth. Com. v. Lane, 113 Mass. 458; Whippen v. Whippen, 171 Mass. 560, 563.

No. 57.

Answer — General Denial.

The libellee answering the averments of the said libel denies each and every allegation therein contained.

The Same.

And the said Alexander Orrok comes and defends, etc., when, etc., and says the allegations, matters, and things in the libel contained are false and groundless, and that there is not any cause of divorce as prayed for; and thereof he puts himself on trial. Orrok v. Orrok, 1 Mass. 341.

No. 58.

Denying Validity of Marriage.

That a ceremony was performed between the libellant and the libellee at the city of.....in the State ofon the.....day of..... 19 , but he denies that he was on said day, or at any time, legally married to the libellant, but says that, at the time said marriage was performed, the said libellant had a husband living named..... who resided in the city of.....on the..... day of..... 19 , and which said marriage was in force on and after the day of her alleged marriage to the libellee.

No. 59.**Condonation.**

That after the times mentioned in the libel and before the commencement of this suit, the libellant being fully informed as to matters therein alleged, freely condoned the alleged adultery, and forgave the libellee therefor, and freely cohabited with him, and that ever since such condonation the libellee has been a faithful husband to the libellant, and has constantly treated her with conjugal kindness.

No. 60.**The Same — Condonation.**

That the said.....after the said supposed transgression in the libel alleged, has admitted the said.....the libellee, into conjugal society or embraces, and has condoned the same, after she knew of the said acts of adultery.

No. 61.**The Same — Condonation.**

The libellee alleges that since the filing of said libel the libellant has voluntarily cohabited with him as his wife, and thereby condoned the offense alleged in the libel.

No. 62.**The Same — Condonation.**

The libellee also says that after the acts alleged in the libel the libellant resided and cohabited with him as his wife, and voluntarily forgave and condoned the alleged offense.

No. 63.**Recrimination.**

That on or about the.....day of.....
 19 , the libellant (here state a cause of divorce as in a libel).

That after said offense was committed, the libellee separated from the libellant, and since said time has not cohabited with the libellant or forgiven her offense.

No. 64.**The Same — Recrimination.**

The libellee further alleges that the libellant has been guilty of (here state a cause of divorce), and that the libellee on discovering said offense (or after the commission of said offense) separated from the libellant and has not condoned or forgiven said offense.

No. 65.**The Same — Recrimination.**

The libellee also says that the libellant committed adultery with one.....at the libellee's residence during his absence in the months of.....and.....; and the libellee, on discovering said offense, ceased to cohabit with the libellant, and has not condoned her offense.

No. 66.**The Same — Recrimination.**

The libellee denies all the allegations contained in the libel, and says that the libellant, at divers times before the filing of her said libel, committed the crime of adultery with one M. Lugo, and with

divers other persons whose names are unknown to the libellee but by information of the name of.....; wherefore he says that the prayer of the libel should not be granted.

Based upon precedent in *Pastoret v. Pastoret*, 6 Mass. 276.

No. 67.

Connivance and Procurement.

The libellee says that if anything occurred between her and said C..... which might appear to lead to the inference that she had committed the crime of adultery with said C....., the same was caused, procured and connived at by the libellant, and that said C..... was brought by the libellant to the house in which the libellant and the libellee resided in said..... ostensibly as a lodger, but really for the purpose of getting into such a situation with the libellee as would lead to the inference that said C..... had committed adultery with her.

Based upon precedent in *Robbins v. Robbins*, 140 Mass. 528.

No. 68.

Collusion.

The libellee says that if anything occurred between her and said C..... which might appear to lead to the inference that she had committed the crime of adultery with said C..... the same was committed with the knowledge and consent of the libellant, and that the libellant and libellee collusively agreed that the acts should be committed or appear to have been committed for the purpose of enabling the libellant to obtain a divorce.

No. 69.**Plea of Collusion to Prevent a Decree Nisi Being Made Absolute.**

That the said.....the libellee, was aware that the libellant had committed adultery with.....atand, nevertheless, collusively agreed with the libellant not to defend the suit, in order that she might obtain a divorce.

See *Gray v. Gray*, 2 Swab. & Tr. 554.

No. 70.**Decree for Costs.**

It is ordered that the libellee pay to the libellant the costs of this suit, to be taxed, and that she have execution therefor, according to the course and practice of the court.

Note. — The wife, if she prevail in a libel, will be allowed costs against her husband. *Wheeler v. Wheeler*, 2 Dane Ab. 310 (1799); *Stevens v. Stevens*, 1 Met. 279; *Atkins v. Atkins*, (Suffolk, 1849); *Burrows v. Burrows*, 107 Mass. 428.

So also when she petitions for an increase of alimony. *Bursler v. Bursler*, 5 Pick. 428.

No. 71.**Certificate of Decree Absolute.**

R. L., ch. 152, sec. 18.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

I hereby certify that at the Superior Court holden at Boston, within and for the county of Suffolk, on the..... day of.....A. D....., a divorce from the

bond of matrimony — nisi — was decreed by the court, between
of.....
 libellant, and.....of.....
 libellee, in favor of said libellant, for the cause which is fully set
 forth in the libel on file in said court, to wit:

.....

 to become absolute after the expiration of six months, unless the
 court shall have, for sufficient cause, on application of any party in-
 terested, otherwise ordered.

And on the.....day of.....A. D.
, the said six months having expired, and the court not having
 otherwise ordered, said decree became absolute.

In testimony whereof I have hereunto set my hand, and
 affixed the seal of said court, at Boston, this
day of....., A. D.

[SEAL]

Clerk.

No. 72.

**Same — Certificate of Decree Absolute in Use Prior to the
 Statute of 1887, ch. 332, Which Conferred Upon the
 Superior Court Exclusive Original Jurisdiction in Causes
 of Divorce.**

COMMONWEALTH OF MASSACHUSETTS.

MIDDLESEX, ss.

I hereby certify that at the Supreme Judicial Court holden at
, within and for the county of Middlesex,
 on the third Tuesday of....., in the year of our
 Lord one thousand eight hundred and.....,
 to wit: on the.....day of.....
 A. D. 18 , a divorce from the bond of matrimony was decreed by

the court between.....of.....
in the county of....., and.....
of....., in favor of said.....,
for the cause which is fully set forth in the libel on file in said court.
.....
.....
.....

In testimony whereof, I have hereunto set my hand, and
affixed the seal of said court at Cambridge, this
.....day of.....
A. D. 18 .

[SEAL]
Clerk.

No. 73.

Application of Party for Decree Absolute.

Form in use prior to St. 1893, ch. 280 — See P. S., ch. 146, sec. 19.

SUPERIOR COURT.

SUFFOLK, ss.189 .
.....Libellant,
vs.
.....Libellee.

And now comes the said.....and says that a
decree of divorce nisi was entered in the above entitled libel for
divorce on the.....day of.....
A. D. 189 , for the cause of.....
.....
.....
.....
.....
and that six months have elapsed since the entry of said decree; and
makes application that said decree nisi now be made absolute.
.....

Certificate of Record.

SUPERIOR COURT.

SUFFOLK, SS.189 .
Libellant,
vs.
Libellee.

I hereby certify that I have examined the records and files in the above entitled libel for divorce, and find that a decree of divorce nisi from the bonds of matrimony was entered on the..... day of.....A. D. 189 , in favor of the said libellant for the cause of.....

.....

That six months have expired since the entry of said decree, that no objection has been filed, and no motion appears to have been made to set aside the decree, and that no reason appears of record why the decree should not be made absolute.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at Boston, in said county, this.....day of..... A. D. 189 .

.....*Clerk.*

Decree Absolute.

SUPERIOR COURT.

SUFFOLK, SS.189 .
Libellant,
vs.
Libellee.

And now, it appearing, in the above entitled libel for divorce, that a decree of divorce nisi from the bond of matrimony was entered on

the.....day of.....189 ,
in favor of the said libellant.....for the cause
of.....
.....
.....
.....
.....

to become absolute on the application of either party to the court, or
any justice thereof, in term time or vacation, after the expiration of
six months from the entry of said decree, unless the court should have,
for sufficient cause, on application of any party interested, otherwise
ordered; and it further appearing that said six months have expired,
and that no objection has been filed:

It is ordered, upon the application of said.....
that said decree of divorce nisi become absolute.

.....
Justice of the Superior Court.

Decree of Divorce Absolute on the Application of a Party.

COMMONWEALTH OF MASSACHUSETTS.

MIDDLESEX, SS.

I hereby certify that, at the Superior Court holden within and for
the county of Middlesex, on the.....day of
.....in the year of our Lord one thousand eight
hundred and....., a divorce from the bond of
matrimony — nisi — was decreed by the court, between.....
of....., in the county of.....
and.....of.....
.....
in favor of said.....
for the cause of.....
.....
on the part of said.....
.....

.....

 To become absolute after the expiration of six months, on application to the court, or any justice thereof.

And on the.....day of.....A. D. 189 ,
 upon application of said.....
 said decree was made absolute.

In testimony whereof I have hereunto set my hand, and
 affixed the seal of said court, at Cambridge, this
day of.....
 A. D. 189 .

.....
Clerk.

Note. — This form is no longer in use, and is inserted here to show the former practice which required the party who desired to have the decree nisi made absolute to make application therefor. The decree nisi did not become absolute unless a decree to that effect was entered by the court, no matter how long a time had elapsed. P. S. ch. 146, sec. 19. St. 1881, ch. 234, sec. 2.

It was also necessary at one time for the party in whose favor a decree nisi was entered to cause the fact of the entry of such decree to be published in some newspaper to be designated by the court before the decree would be made absolute. St. 1867, ch. 222, sec. 2; *Moors v. Moors*, 121 Mass. 233; *Darrow v. Darrow*, 159 Mass. 262.

Notice by publication was abolished by the St. of 1882, ch. 223.

The decree nisi, as the law now stands, becomes absolute as a matter of course after the expiration of six months from its entry, unless the court has, for sufficient cause, on application of any party interested, otherwise ordered. St. 1893, ch. 280; R. L., ch. 152, sec. 18; Divorce Rule V.

No. 74.

Affidavit of Notice.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.

SUPERIOR COURT.

.....Libellant,

vs.

.....Libellee.

AFFIDAVIT OF NOTICE.

I,....., attorney for the above named libellant, on oath do certify, that I have served the above named libel, and the order of court thereon, as therein directed, by giving notice thereof to the said libellee by causing to be published once a week, three weeks successively, in the....., a newspaper printed in Boston, in the county of Suffolk, viz.: on the..... days of..... A. D....., an attested copy of said libel with the order of court thereon, (the three newspapers containing copies of said publication on said dates together with the copy of the libel and order issued from the clerk's office are filed herewith) and by sending by mail on the.....day of..... to the last known address of said libellee, a registered letter, containing an attested copy of said libel, and order addressed as follows:....

.....

 The registry receipt signed by.....was returned to me by the post office officials and is hereto annexed and marked —

.....
 The said registered letter was returned to me by the post office officials unclaimed and unopened, and is hereto annexed and marked —

.....
Atty. for Libellant.

SUFFOLK, ss. A. D.

Then personally appeared.....and made
oath that the foregoing statement by him subscribed is true.

Before me.....

Justice of the Peace.

No. 75

The Same — Another Form of Affidavit of Notice.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

MIDDLESEX, ss. LIBEL FOR DIVORCE No.

.....vs.....

I,....., attorney for the libellant in the
above entitled libel for divorce, hereby certify that I caused an at-
tested copy of said libel and order of court thereon to be published
in the.....a newspaper published in.....
in the county of.....three weeks successively, to wit:
on the.....

.....

the last publication being fourteen days at least before the return day
named in said order. A copy of each issue of said newspaper con-
taining said publication is returned herewith.

I further certify that I caused an attested copy of said libel and
order to be sent by registered letter to the residence of the libellee as
set out in the libel — last known residence of the libellee — and that
said letter was delivered to said libellee and a postal receipt supposed
to be signed by the libellee was returned and is hereto annexed — not
delivered to the libellee but was returned and is hereto annexed.

.....
....., ss. 1900.

Subscribed and sworn to before me.

.....

Justice of the Peace.

No. 76.

Petition for Writ of Protection.

Your petitioner says that he is not a resident of the Commonwealth of Massachusetts; that he is here temporarily for the purpose of attending the trial of the divorce case of.....v.No.....in which he is the libellant, now on the short list in said court, and undisposed of; that said suit has not been commenced collusively, but was commenced and is conducted in good faith in every respect; that he apprehends his arrest for debt, and prays that this court may issue a writ of protection in his behalf.

Subscribed and sworn to before me the.....
day of.....A. D.....

.....
Justice of the Peace.

No. 77.

Writ of Protection.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

To the Sheriffs of our respective Counties, or either of their Deputies, and to the Coroners of the said Counties, and to the Constables of the several Cities and Towns in said Counties, Greeting:

Whereas.....of.....in our county of.....is a material witness in an action depending in our Superior Court, now holden at Boston, within and for the county of Suffolk, between one.....
.....
.....
at the trial whereof it is necessary, as the said.....suggests, that he should be present: and the said.....having, in our said court, humbly supplicated for our protection, that so he may attend the trial of the said cause without danger of arrests

in civil causes; which of our grace we have thought proper to grant. We do therefore prohibit you, and each and every of you, to attach the body of the said.....or to serve him with any civil process whatever, while traveling to or from our said court, or during his attendance there for the trial of the said cause.

Witness,.....Esquire, at Boston, the.....
day of.....in the year of our Lord one thousand
eight hundred and ninety-.....

.....Clerk.

No. 78.

Application for Marriage License at the Office of the Clerk of

GROOM.	BRIDE.
Name.....	Name.....
White or colored.....	White or colored.....
Place of residence, Street and No.....	Place of residence, Street and No.....
.....
Age..... Years.....	Age..... Years.....
Occupation.....	Occupation.....
Birthplace, Town and State.....	Birthplace, Town and State.....
.....
Father's name.....	Father's name.....
Mother's maiden name.....	Mother's maiden name.....
Marriage, first or second.....	Marriage, first or second.....
Applicant.....	
Residence.....	

The undersigned, applicant, as aforesaid, does hereby on oath declare and say that the statements made by him on the within application are true; that the notice of intention of marriage of both parties named herein is given with the consent of both parties to the intended marriage.

.....

COMMONWEALTH OF MASSACHUSETTS.

....., ss.190

Subscribed and sworn to,

Before me,

.....

City Clerk.

No. 79.

Notice to Produce.

Take notice that you are hereby required to produce at the hearing a certain letter, dated the.....day of..... A. D. 19 , and written by the libellant (or libellee) to you the libellee (or libellant) and, etc., (here specify the other documents in a similar manner which you desire the opposite party to produce at the hearing), and all other documents, letters, books, papers, and writings containing any entry, memorandum, minute, or other matter relating to the matters in question in this suit.

No. 80.

Affidavit of Deputy Sheriff — and Clerk's Certificate.

COMMONWEALTH OF MASSACHUSETTS.

MIDDLESEX, ss.

I,.....clerk of the Supreme Judicial Court within and for said county of Middlesex, do certify thatwho has made return of the service of the annexed precept, was at the date thereof a deputy of the sheriff of said county of Middlesex, duly and legally qualified to make service of all civil process in said county, and full faith and credit are due his official acts. And said deputy made oath before me that his return on the annexed notice is true.

Witness my hand, and the seal of said Supreme Judicial
 [L.s.] Court, at Cambridge, in said county, this.....
 day of.....A. D. 190 .
*Clerk.*

Note. — This form is used when a libel pending in another jurisdiction is served in this State by a local deputy sheriff. It is obvious that it may be adapted to a libel pending here and served elsewhere.

REVISED LAWS OF MASSACHUSETTS.

CHAPTER 151.

OF MARRIAGE.

SECTIONS 1-11. — Certain Marriages Prohibited.

SECTIONS 12-15. — Legitimacy and Care of Issue of Void Marriages.

SECTIONS 16-29. — Notice of Intention of Marriage.

SECTIONS 30-36. — Solemnization of Marriage.

SECTIONS 37-39. — Evidence of Marriage.

SECTIONS 40-44. — Penalties.

CERTAIN MARRIAGES PROHIBITED.

SECTION 1. [*Marriage between certain relations prohibited.*] No man shall marry his mother, grandmother, daughter, granddaughter, sister, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister or mother's sister.

C. L. 102, § 5; 1695-6, 2, § 1; 1785, 69, § 1; R. S. 75, § 1; G. S. 106, § 1; P. S. 145, § 1.

SECTION 2. [*Same subject.*] No woman shall marry her father, grandfather, son, grandson, brother, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother or mother's brother.

1785, 69, § 1; R. S. 75, § 2; G. S. 106, § 2; P. S. 145, § 2; 10 Met. 451.

SECTION 3. [*Same subject.*] The prohibition of the two preceding sections shall continue notwithstanding the dissolution, by death or divorce, of the marriage by which the affinity was created, unless the divorce was granted because such marriage was originally unlawful or void.

R. S. 75, § 3; G. S. 106, § 3; P. S. 145, § 3.

SECTION 4. [*Polygamy forbidden.*] A marriage contracted while either party thereto has a former wife or husband living, except as provided in section six and in chapter one hundred and fifty-two, shall be void.

1784, 40, § 2; 1785, 69, § 2; R. S. 75, § 4; G. S. 106, § 4; P. S. 145, § 4; 113 Mass. 458; 170 Mass. 150; 171 Mass. 560.

SECTION 5. [*Insane persons incapable of marrying.*] An insane person or an idiot shall not be capable of contracting marriage. The validity of a marriage shall not be questioned by reason of the insanity or idiocy of either party in the trial of a collateral issue, but shall be raised only in a process instituted in the lifetime of both parties to test such validity.

R. S. 75, § 5; 1843, 5; 1845, 222; G. S. 106, § 5; 107, § 2; P. S. 145, §§ 5, 9; 12 Mass. 363; 4 Pick. 32; 4 Allen, 458.

SECTION 6. [*Marriage during existence of former marriage valid, when.*] If a person, during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract with due legal ceremony and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to the former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents.

1895, 427; 1896, 499; 170 Mass. 150; 171 Mass. 560.

SECTION 7. [*Minors not to be married without consent of parents.*]

A magistrate or minister shall not solemnize a marriage if he has reasonable cause to believe that the male is under the age of twenty-one years or the female is under the age of eighteen years, except with the consent of the parent or guardian having the custody of the minor, if there is any such parent or guardian in this commonwealth competent to act.

1692-3, 25, § 1; 1695-6, 2, § 4; 1786, 3, § 3; 1834, 177, § 2; R. S. 75, § 15; G. S. 106, § 13; P. S. 145, § 6; 127 Mass. 468.

SECTION 8. [*Marriages void without decree, when.*] A marriage solemnized within this commonwealth which is prohibited by reason of consanguinity or affinity between the parties, or of either of them having a former wife or husband living, shall be void without a decree of divorce or other legal process.

1695-6, 2, § 1; 1785, 69, § 2; R. S. 76, § 1; G. S. 107, § 1; P. S. 145, § 7.

SECTION 9. [*Between minors void after separation, etc.*] A marriage solemnized when either party is under the age of consent shall be void without a decree of divorce or other legal process if the parties separate during such nonage and do not afterward cohabit.

R. S. 76, § 2; G. S. 107, § 3; P. S. 145, § 8; 1 Gray, 119.

SECTION 10. [*Foreign, void, when.*] A marriage shall be void in this commonwealth if the parties, both being resident here and intending to return and reside here, in order to evade any of the provisions of the first five sections of this chapter go into another state or country and there have their marriage solemnized, and return and reside here.

R. S. 75, § 6; G. S. 106, § 6; P. S. 145, § 10; 157 Mass. 73; 170 Mass. 150; 171 Mass. 560.

SECTION 11. [*Determination of validity of marriage.*] If the validity of a marriage is doubted, either party may file a libel for annulling such marriage, or if it is denied or doubted by either party, the other party may file a libel for affirming the marriage. Such libel shall be filed in the same manner as a libel for divorce; and all the provisions of chapter one hundred and fifty-two relative to libels for divorce shall, so far as appropriate, apply to libels under the provisions of this section. Upon proof of the validity or nullity of the marriage, it shall be affirmed or declared void by a decree of the

court, and such decree of nullity may be made although the marriage was solemnized out of the commonwealth, if at that time and also when the libel was filed the libellant had his domicile in the commonwealth or has resided in this commonwealth for five years last preceding the filing of said libel, unless the court finds that he has removed into this commonwealth for the purpose of obtaining said decree.

R. S. 76, §§ 3, 4: 1846. 197: 1855. 27; G. S. 107, §§ 4, 5; P. S. 145, § 11; 1886, 36; 114 Mass. 563, 566; 149 Mass. 223; 156 Mass. 578; 161 Mass. 115; 171 Mass. 404; 175 Mass. 157, 383.

LEGITIMACY AND CARE OF ISSUE OF VOID MARRIAGES.

SECTION 12. [*Issue of void marriages illegitimate.*] The issue of a marriage which is declared void by reason of consanguinity or affinity between the parties shall be illegitimate.

R. S. 76, § 21; G. S. 107, § 28; P. S. 145, § 12.

SECTION 13. [*Of marriage void by reason of nonage, insanity, etc.*] The issue of a marriage which is declared void by reason of the nonage, insanity or idiocy of either party shall be the legitimate issue of the parent who was capable of contracting the marriage.

R. S. 76, § 22; G. S. 107, § 29; P. S. 145, § 13.

SECTION 14. [*Of marriage void by reason of prior marriage.*] If a marriage is declared void by reason of a prior marriage of either party, and it appears that the second marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, that fact shall be stated in the decree, and the issue of the second marriage, born or begotten before the commencement of the suit, shall be the legitimate issue of the parent capable of contracting the marriage.

R. S. 76, § 23; G. S. 107, § 30; P. S. 145, § 14; 114 Mass. 563; 156 Mass. 578.

Repealed by St. 1902, ch. 310, which is as follows:

[ST. 1902, CHAP. 310.]

AN ACT RELATIVE TO THE ISSUE OF VOID MARRIAGES.

Be it enacted, etc., as follows:

SECTION 1. If a marriage is declared void by reason of a prior marriage of either party and the court finds that the second marriage

was contracted with the full belief of the party who was capable of contracting the second marriage that the former husband or wife was dead, or that the former marriage was void, or that a divorce had been decreed which left the party to the former marriage free to marry again, such finding shall be stated in the decree, and the issue of the second marriage, if born or begotten before the second marriage was declared void, shall be the legitimate issue of the parent capable of contracting the marriage.

SECTION 2. Section fourteen of chapter one hundred and fifty-one of the Revised Laws is hereby repealed.

SECTION 3. This act shall take effect upon its passage, and it shall apply to proceedings pending upon or instituted after its passage, although such second marriage may have been contracted before its passage. [*Approved April 17, 1902.*]

SECTION 15. [*Care and maintenance of children of void marriage.*] Upon or after a decree of nullity, the court shall have similar power to make orders relative to the care, custody and maintenance of the minor children of the parties as upon a decree of divorce.

1820, 56, § 1; R. S. 76, § 26; G. S. 107, § 33; P. S. 145, § 15.

NOTICE OF INTENTION OF MARRIAGE.

SECTION 16. [*Notice of intention of marriage to be entered.*] Persons who intend to be joined in marriage in this commonwealth shall before their marriage cause notice of their intention to be entered in the office of the clerk or registrar of the city or town in which they respectively dwell, or, if they do not dwell within the commonwealth, in the office of the clerk or registrar of the city or town in which they propose to have the marriage solemnized.

C. L. 101, § 2; 1695-6, 2, § 4; 1727-8, 11; 1786, 3, § 3; 1834, 177, § 2; R. S. 75, § 7; 1850, 121, § 1; G. S. 106, § 7; 1867, 58, § 1; P. S. 145, § 16.

SECTION 17. [*Notice of intention of marriage, form of.*] The clerk or registrar may require notice of intention of marriage to be given to him in writing, on blanks to be furnished by him, by one of the parties to such intended marriage, or by his or her parent or legal guardian, and may require the party who gives such notice to make oath before him to the truth of all the statements therein, whereof he

or she could have knowledge. No fee shall be charged for administering such oath.

1894, 409, § 1.

SECTION 18. [*Where and when receivable.*] The clerk or registrar shall not be required to receive notices of intention of marriage on the Lord's day nor on legal holidays nor at any place except his office.

1894, 409, § 3.

SECTION 19. [*Notice of intention of marriage not receivable from certain minors.*] The clerk or registrar shall not, except as provided in the following section, receive a notice of the intention of marriage of any male under the age of eighteen years, nor of any female under the age of sixteen years.

1894, 401, § 1.

SECTION 20. [*Marriage of minors, how authorized.*] The judge of probate for the county in which a minor under the age specified in the preceding section resides may, after a hearing, make an order allowing the marriage of such minor, if the father of such minor or, if he is not living, the mother or, if neither parent is alive and resident in this commonwealth, a legal guardian duly appointed has consented to such order. Said judge of probate may also after a hearing make such order in the case of a person whose age is alleged to exceed that specified in the preceding section, but who is unable to produce an official record of birth, whereby the reasonable doubt of the clerk or registrar, as exercised under the provisions of section twenty-eight, may be removed. Upon the receipt of a certified copy of such order by the clerk or registrar of the city or town in which such minor resides, he shall receive the notice required by law and issue a certificate as in other cases.

1894, 401, § 2; 1899, 197.

SECTION 21. [*Notice of intention not to be given without consent of parties. Cancellation of notice of intention.*] Whoever, without the consent of both parties to an intended marriage, gives the notice of their intention of marriage which is required by law shall be liable in damages to either of such parties whose name was so used without such consent. The superior court may, upon petition of either party

who is alleged to intend marriage in a notice of intention of marriage given without the consent of both parties, and which is not followed by their intermarriage, after notice and a hearing, order that such notice of intention of marriage be cancelled in the records of the city or town in which it was recorded.

1894, 409, § 6; 1894, 409, § 7.

SECTION 22. [*Notice of intention of marriage of adopted persons.*]

A party to an intended marriage who has been legally adopted shall, upon the notice of intention of such marriage, give the names of his or her parents by adoption; and the names of his or her parents may also be added. The consent of a parent by adoption to the marriage of a minor shall be sufficient if the consent of a parent of a minor is required by law as a preliminary to marriage. If the natural parents of a minor have been divorced and the consent of one of them is required by law, preliminary to the marriage of such minor, the consent of the parent who has the custody of such minor shall be sufficient.

1897, 424, § 4.

SECTION 23. [*Certificate of intention of marriage.*] The clerk or registrar shall deliver to the parties a certificate signed by him, specifying the time when notice of the intention of marriage was entered with him and all facts relative to the marriage which are required by law to be ascertained and recorded, except those relative to the person by whom the marriage is to be solemnized. Such certificate shall be delivered to the minister or magistrate before whom the marriage is to be contracted, before he proceeds to solemnize the same.

1727-8, 11; 1786, 3, § 3; 1834, 177, § 2; R. S. 75, § 9; 1850, 121, § 2; G. S. 106, § 8; 1867, 58, § 1; P. S. 145, § 17.

SECTION 24. [*Alteration of certificate of intention prohibited.*]

No alteration or erasure shall be made by any person on such certificate, until it has been returned to the possession of such clerk or registrar, and then only in such form and to such extent as said clerk or registrar may prescribe. Any such certificate may be recorded after correction in accordance herewith.

1897, 424, § 1.

SECTION 25. [*Penalty for issuing certificate to certain minors.*] If the clerk or registrar issues such certificate to a male under the age of twenty-one years, or to a female under the age of eighteen years, when he has reasonable cause to believe the person to be under such age, except upon the application or consent in writing of the parent, master or guardian of such person, he shall forfeit not more than one hundred dollars; but if there is no parent, master or guardian in this commonwealth competent to act, a certificate may be issued without such application or consent.

1853, 335, § 1: G. S. 106, § 9; P. S. 145, § 18.

SECTION 26. [*Duplicate copies of notice of intention of minors, when.*] If it is necessary to give notice in two cities or towns of the intention of marriage of a minor, the clerk or registrar who first takes the consent of the parent or guardian shall take it in duplicate, retaining one copy and delivering the other duly attested by him to the person who obtains the certificate, to be given to the clerk or registrar issuing the second certificate; and no fee shall be charged for such consent or copy.

1894, 409, § 4.

SECTION 27. [*Affidavit of age.*] The clerk or registrar may require of an applicant for such certificate an affidavit setting forth the age of the parties. Such affidavit shall be sworn to before a justice of the peace, and shall be sufficient proof of age to authorize the issuing of the certificate.

1853, 335, § 2: G. S. 106, § 10; P. S. 145, § 19.

SECTION 28. [*Refusal of certificate, when.*] The clerk or registrar may refuse to issue a certificate if he has reasonable cause to believe that any of the statements contained in the notice of intention of marriage are incorrect; but he may, in his discretion, accept depositions under oath, made before him, which shall be sufficient proof of the facts therein stated to authorize the issuing of a certificate. He may also dispense with the statement of any facts required by law to be given in a notice of intention of marriage, if they do not relate to or affect the identification or age of the parties, if he is satisfied that the same cannot with reasonable effort be obtained.

1894, 409, § 2.

SECTION 29. [*Citizens married outside commonwealth to file certificate here.*] If a marriage is solemnized in another state between parties living in this commonwealth, who return to dwell here, they shall, within seven days after their return, file with the clerk or registrar of the city or town in which either of them lived at the time of their marriage a certificate or declaration of their marriage, including the facts relative to marriages which are required by law, and for neglect thereof shall forfeit ten dollars.

1850, 121, § 3; G. S. 106, § 12; P. S. 145, § 21.

SOLEMNIZATION OF MARRIAGE.

SECTION 30. [*Solemnization of marriage.*] A marriage may be solemnized in any place within this commonwealth by a minister of the gospel, ordained according to the usage of his denomination, who resides in this commonwealth and continues to perform the functions of his office; by a rabbi of the Israelitish faith, duly licensed by a congregation of said faith established in this commonwealth, who has filed with the clerk or registrar of the city or town in which he resides a certificate of the establishment of the synagogue, the date of his appointment thereto and of the term of his engagement; by a justice of the peace if he is also clerk or assistant clerk of a city or town, or a registrar or assistant registrar, in the city or town in which he holds such office, or if he is also clerk or assistant clerk of a court, in the city or town in which the court is authorized to be held, or if he has been designated as provided in the following section and has received a certificate of designation and has qualified thereunder, in the city or town in which he resides; and it may be solemnized among Friends or Quakers according to the usage of their societies; but no person shall solemnize a marriage in this commonwealth unless he is able to read and write the English language.

C. L. 102, § 5; 1692-3, 25, § 1; 1695-6, 2, § 4; 1716-17, 16, § 1; 1762-3, 28; 1772-3, 31, §§ 1, 2; 1786, 3, §§ 1, 2, 8; 1817, 141; 1820, 55; 1834, 177, §§ 1, 6; R. S. 75, §§ 16, 22; 1850, 121, § 5; G. S. 106, §§ 14, 15; 1867, 58, § 2; P. S. 145, §§ 22, 23; 1893, 461, § 1; 1894, 409, § 5; 1896, 306, § 4; 1899, 387, § 1; 1 Pick. 234; 127 Mass. 459; [1 Op. A. G. 445].

SECTION 31. [*Designation of justices of the peace to solemnize marriage.*] The governor may in his discretion designate a justice of

the peace in each city and town and such further number, not exceeding one for every five thousand inhabitants of a city or town, as he considers expedient, to solemnize marriages, and may for cause at any time revoke such designation. The secretary of the commonwealth shall, upon payment of five dollars to him by a justice of the peace so designated, issue to him a certificate of such designation.

1899, 387, §§ 2, 3.

SECTION 32. [*Persons solemnizing marriages to keep records and make returns.*] Every justice of the peace, minister, rabbi and clerk or keeper of the records of a meeting wherein marriages among Friends or Quakers are solemnized shall make and keep a record of each marriage solemnized by him, or in such meeting, and of all facts relative to the marriage which are required to be recorded by the provisions of section one of chapter twenty-nine. He shall also, between the first and tenth days of the month following each marriage solemnized by him, return each certificate issued under the provisions of section twenty-three to the clerk or registrar who issued the same; and if the marriage was solemnized in a city or town other than the place or places in which the parties to the marriage resided, return a copy of the certificate, or of either certificate if two were issued, to the clerk or registrar of the city or town in which the marriage was solemnized. Each certificate and copy so returned shall contain a statement giving the place and date of marriage, attested by the signature of the person who solemnized the same or of said clerk or keeper of the records of a Friends or Quaker meeting. The person who solemnized the marriage shall add the title of the office by virtue of which the marriage was solemnized, as "justice of the peace", "minister of the gospel", "clergyman", "priest" or "rabbi", and his residence. All certificates or copies so returned shall be recorded by the clerk or registrar who receives them. Whoever neglects to make the record and returns required by the provisions of this section shall for each neglect forfeit not less than twenty nor more than one hundred dollars.

C. L. 130, § 2; 1692-3, 25, § 3; 1695-6, 2, §§ 4, 6; 1716-17, 16, § 3; 1786, 3, §§ 6, 8; 1795, 7; 1817, 61; 1834, 177, §§ 5, 6; R. S. 75, §§ 17, 18, 23; 1844, 159, § 3; G. S. 106, §§ 16, 17; 1879, 116; 1881, 11, § 1; P. S. 145, § 24; 1887, 202, § 3; 1892, 300; 1897, 424, § 5.

SECTION 33. [*Correction of imperfect certificates of marriage.*]

If a certificate of marriage is found, upon its return to the clerk or registrar, to have been incorrectly filled out by the person who solemnized a marriage under it, the clerk or registrar shall have it corrected and shall enforce the penalties, if any, provided by law relative thereto. Such imperfect certificates shall be recorded and indexed by the clerk or registrar.

1897, 424, § 2.

SECTION 34. [*Marriages valid, though irregularly solemnized.*]

A marriage which is solemnized by a person who professes to be a justice of the peace, a minister of the gospel or a rabbi or which is solemnized among Friends or Quakers according to their usages shall not be void, nor shall the validity thereof be in any way affected by want of authority in such person or society, or by an omission or by informality in the manner of entering the intention of marriage, if the marriage is in other respects lawful and is consummated with a full belief of either of the persons so married that they have been lawfully married.

1834, 177, § 7; R. S. 75, § 24; G. S. 106, § 20; 1881, 11, § 2; P. S. 145, § 27; 1893, 461, § 2; 110 Mass. 314, 127 Mass. 465; 155 Mass. 534.

SECTION 35. [*Marriage by consul, etc.*] Marriages which are solemnized in a foreign country by a consul or diplomatic agent of the United States shall be valid in this commonwealth.

G. S. 106, § 23; P. S. 145, § 28; 5 Allen, 257.

SECTION 36. [*Fees by cities and towns to persons solemnizing marriages.*]

A city by ordinance and a town by vote may authorize its clerk or registrar to pay on demand, in his office, twenty-five cents to any person who has legally solemnized a marriage in this commonwealth, after the receipt by such clerk or registrar of the certificate in legal form of the solemnization of such marriage. A city or town which passes such ordinance or vote shall annually appropriate the money necessary therefor, and the clerk or registrar thereof shall file quarterly with the treasurer or other proper financial officer of said city or town proper vouchers for all payments so made by him.

1897, 424, § 3.

EVIDENCE OF MARRIAGE.

SECTION 37. [*Record.*] The record of a marriage made and kept as provided by law by the person by whom the marriage was solemnized, or by the clerk or registrar of a city or town, or a copy of such record duly certified, shall be prima facie evidence of such marriage.

R. S. 75, § 25; G. S. 106, § 21; P. S. 145, § 29; 10 Allen, 161; 133 Mass. 246; 156 Mass. 228.

SECTION 38. [*Certificate, etc., of consul, etc.*] A copy of the record of a marriage solemnized by a consul or diplomatic agent of the United States or a certificate from such consul or agent shall be prima facie evidence of such marriage.

G. S. 106, § 23; P. S. 145, § 30.

SECTION 39. [*Admissions and general repute, etc.*] Marriage may be proved by evidence of an admission thereof by an adverse party, by evidence of general repute or of cohabitation of the parties as married persons, or of any other fact from which the fact may be inferred.

1840, 84; 1841, 20; G. S. 106, § 22; P. S. 145, § 31; 3 Pick. 293; 14 Gray, 411; 5 Allen, 257; 10 Allen, 196; 99 Mass. 444; 110 Mass. 314; 120 Mass. 387; 163 Mass. 453.

PENALTIES.

SECTION 40. [*Penalty for solemnizing marriage without authority.*] Whoever, not being duly authorized by the statutes of this commonwealth, undertakes to join persons in marriage in this commonwealth shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year, or by both such fine and imprisonment.

1786, 3, § 5; 1834, 177, § 4; R. S. 75, § 20; G. S. 106, § 19; P. S. 145, § 26; 1896, 306, § 2.

[St. 1902, CHAP. 249.]

AN ACT TO PROHIBIT ADVERTISING REGARDING THE PERFORMANCE
OF THE MARRIAGE CEREMONY.

Be it enacted, etc., as follows:

SECTION 1. It shall be unlawful for any person to advertise in a newspaper, circulated in this Commonwealth, or by any other means, to perform or to procure the performance of the marriage ceremony.

SECTION 2. Whoever violates any provision of this act shall be liable to a fine of not less than ten nor more than one hundred dollars. [*Approved April 1, 1902.*]

SECTION 41. [*Penalty for joining persons in marriage without certificate.*] Whoever, being duly authorized to solemnize marriages in this commonwealth, joins in marriage persons who have not complied with the statutes relative to procuring certificates of notice of intention of marriage shall be punished by a fine of not more than five hundred dollars.

1695-6, 2, § 4; 1772-3, 31, § 3; 1786, 3, § 5; 1834, 177, §§ 4, 9; R. S. 75, § 19; G. S. 106, § 18; 1867, 58, § 3; P. S. 145, § 25; 1896, 306, § 1.

SECTION 42. [*For illegal alteration of certificate of intention.*] Whoever makes an illegal alteration or erasure on a certificate of intention of marriage shall be punished by a fine of not more than one hundred dollars.

1897, 424, § 1.

SECTION 43. [*For violation of certain provisions of this chapter.*] Whoever violates any of the provisions of sections seven, seventeen, twenty-one or twenty-six shall, upon conviction thereof within one year after such violation, be punished as provided in section forty.

1894, 409, § 8.

SECTION 44. [*For false statement.*] Whoever, when applying for the certificate described in section twenty-three, wilfully makes a false statement relative to the age, residence, parent, master or guardian of either of the parties intending marriage shall forfeit not more than two hundred dollars.

1857, 34; G. S. 106, § 11; P. S. 145, § 20.

CHAPTER 152.

OF DIVORCE.

- SECTIONS 1-5. — Causes for Divorce.
 SECTIONS 6-19. — Libels for Divorce.
 SECTION 20. — Resumption of Former Name by Wife.
 SECTION 21. — Right to Marry Again.
 SECTION 22. — Effect of Divorce on Legitimacy of Children.
 SECTIONS 23, 24. — Effect of Divorce on Rights to Property.
 SECTIONS 25-28. — Care and Support of Children.
 SECTIONS 29-34. — General Powers of Court.
 SECTION 35. — Foreign Divorces.
 SECTIONS 36-41. — Criminal Provisions.
 SECTIONS 42, 43. — Statistics of Divorce.

CAUSES FOR DIVORCE.

SECTION 1. [*Causes for divorce.*] A divorce from the bond of matrimony may be decreed for adultery, impotency, utter desertion continued for three consecutive years next prior to the filing of the libel, gross and confirmed habits of intoxication caused by the voluntary and excessive use of intoxicating liquor, opium or other drugs, cruel and abusive treatment or, on the libel of the wife, if the husband, being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her.

1785, 69, § 3; 1810, 119; R. S. 76, §§ 5, 6; 1838, 126, § 1; 1857, 228, § 2; G. S. 107, §§ 6, 7, 9; 1870, 404, § 2; 1873, 371, §§ 2, 6; P. S. 146, § 1; 1889, 447; 1 Mass. 240, 346; 4 Mass. 586; 7 Mass. 474; 7 Gray, 279; 99 Mass. 493; 112 Mass. 298; 117 Mass. 202; 126 Mass. 205; 140 Mass. 528; 142 Mass. 361; 143 Mass. 577; 150 Mass. 111; 154 Mass. 515; 157 Mass. 506; 159 Mass. 281; 160 Mass. 216; 168 Mass. 50, 204, 456; 171 Mass. 146; 175 Mass. 7.

SECTION 2. [*Same subject.*] A divorce may also be decreed if either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison or in a jail or house of correction; and, after a divorce for such cause, no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights.

R. S. 76, § 5; 1850, 100, § 1; G. S. 107, § 6; P. S. 146, § 2; 124 Mass. 394; 151 Mass. 151; 169 Mass. 592.

SECTION 3. [*Divorce after absence raising a presumption of death.*] A divorce may be decreed for any of the causes allowed by

the provisions of the two preceding sections although the libellee has been continuously absent for such time and under such circumstances as would raise a presumption of death.

1884, 219; 113 Mass. 314; 147 Mass. 294.

SECTION 4. [*Only if parties have lived together in commonwealth.*] A divorce shall not, except as provided in the following section, be decreed if the parties have never lived together as husband and wife in this commonwealth; nor for a cause which occurred in another state or country, unless before such cause occurred, the parties had lived together as husband and wife in this commonwealth, and one of them lived in this commonwealth at the time when the cause occurred.

R. S. 76, §§ 9-11; G. S. 107, § 12; P. S. 146, § 4; 98 Mass. 158; 103 Mass. 574; 115 Mass. 438; 135 Mass. 83; 143 Mass. 274.

SECTION 5. [*Exception.*] If the libellant has lived in the commonwealth for five years last preceding the filing of the libel, or if the parties were inhabitants of this commonwealth at the time of their marriage and the libellant has lived in this commonwealth for three years last preceding such filing, a divorce may be decreed for any cause allowed by law, whether it occurred in this commonwealth or elsewhere, unless it appears that the libellant has removed into this commonwealth for the purpose of obtaining a divorce.

1843, 77; G. S. 107, § 11; 1877, 174; P. S. 146, § 5; 6 Gray, 157; 154 Mass. 515; 161 Mass. 508.

LIBELS FOR DIVORCE.

SECTION 6. [*Venue of libel.*] Libels for divorce shall be filed, heard and determined in the superior court held for the county in which one of the parties lives, except that, if the libellant has left the county in which the parties lived together and the libellee still lives therein, the libel shall be heard and determined in the court held for that county.

1692-3, 25, § 4; 1785, 69, § 7; 1820, 14, § 10; R. S. 76, §§ 7, 8; 1851, 82, § 2; G. S. 107, §§ 13, 14; P. S. 146, § 6; 1887, 332, § 1; 111 Mass. 158; 150 Mass. 280.

SECTION 7. [*Libel to be signed.*] The libel shall be signed by the libellant, if of sound mind and of legal age to consent to marriage; otherwise, it may be signed by the guardian of the libellant or by a

person admitted by the court to prosecute the libel as his or her next friend.

R. S. 76, § 12; G. S. 107, § 16; P. S. 146, § 7; 7 Mass. 96; 1 Met. 382; 8 Allen, 311; 139 Mass. 377.

SECTION 8. [*Notice to libellee.*] The court or clerk may order the libellee to be summoned to appear and answer at the court having jurisdiction of the cause, by the publication of the libel or of the substance thereof, with the order thereon, in one or more newspapers which shall be designated in the order, or by delivering to the libellee an attested copy of the libel and a summons, or in such other manner as it or he may require. If such order is made by the clerk, the court may order an additional notice. If the libellee does not appear and the court considers the notice defective or insufficient, it may order further notice.

1785, 69, § 8; R. S. 76, §§ 15-17; G. S. 107, §§ 19, 20; 1862, 90; 1863, 109, § 1; P. S. 146, §§ 9, 10; 1890, 370; 1898, 487; 135 Mass. 191; 141 Mass. 432.

SECTION 9. [*Who may contest.*] A person with whom the libellee is alleged in a libel for divorce for adultery to have committed adultery may appear and contest the libel.

1890, 370; 1898, 487.

SECTION 10. [*Attachment of husband's property.*] Upon a libel by a wife for a divorce for a cause which accrued after marriage, the real and personal property of the husband may be attached to secure a suitable support and maintenance to her and to such children as may be committed to her care and custody.

1855, 137, § 1; G. S. 107, § 50; 1866, 148, § 2; P. S. 146, § 11; 107 Mass. 428; 150 Mass. 92; 163 Mass. 530.

SECTION 11. [*How made.*] The attachment may be made upon the summons issued upon the libel, in the same manner as attachments are made upon writs in actions at law, for an amount which shall be expressed in the summons or order of notice. The attachment may be made by trustee process, in which case there shall be inserted in the summons or order of notice a direction to attach the goods, effects and credits of the libellee in the hands of the alleged trustee, and service shall be made upon the trustee by copy. If

attachment is made by the trustee process, the libel shall be filed as provided in section six notwithstanding the provisions of section two of chapter one hundred and eighty-nine. The court may in such cases make all necessary orders to secure to the trustee his costs.

1855, 137, §§ 2, 3, 5; G. S. 107, § 51; 1866, 148, § 3; P. S. 146, § 12.

SECTION 12. [*Same subject.*] The laws relative to attachments of real or personal property shall apply to attachments herein provided for, so far as such laws are not inconsistent with the provisions of the two preceding sections.

1855, 137, § 4; G. S. 107, § 52; P. S. 146, § 13.

SECTION 13. [*Guardian for insane libellee.*] If during the pendency of a libel the libellee is insane, the court shall appoint a suitable guardian to appear and answer in like manner as a guardian for an infant defendant in an action at law may be appointed.

R. S. 76, § 18; G. S. 107, § 21; P. S. 146, § 14; 13 Gray, 264; 114 Mass. 379; 1902, ch. 544, § 21.

SECTION 14. [*Costs or alimony during pendency of libel.*] The court may require the husband to pay into court for the use of the wife during the pendency of the libel an amount which may enable her to maintain or defend the libel, although exceeding the taxable costs; and may require him to pay to the wife alimony during the pendency of the libel.

1851, 82, § 1; 1855, 65; 137, § 6; G. S. 107, § 22; P. S. 146, § 15; 6 Gray, 341; 147 Mass. 159; 161 Mass. 111.

SECTION 15. [*Protection of personal liberty of wife during pendency.*] The court sitting in any county may, upon the petition of the wife, prohibit the husband from imposing any restraint upon her personal liberty during the pendency of the libel.

1820, 56, § 1; R. S. 76, § 24; G. S. 107, § 31; P. S. 146, § 16.

SECTION 16. [*Custody of children during pendency.*] The court may in like manner, upon the application of either party, make such order relative to the care and custody of the minor children of the parties during the pendency of the libel as it may consider expedient and for the benefit of the children.

1820, 56, § 1; R. S. 76, § 25; G. S. 107, § 32; P. S. 146, § 17.

SECTION 17. [*Continuance of libel, and orders for temporary separation, etc.*] The court may, without entering a decree of divorce, cause the libel to be continued upon the docket from time to time, and during such continuance may make orders and decrees relative to a temporary separation of the parties, the separate maintenance of the wife and the custody and support of minor children. Such orders and decrees may be changed or annulled as the court may determine, and shall, while they are in force, supersede any order or decree of the probate court under the provisions of section thirty-three of chapter one hundred and fifty-three, and may suspend the right of said court to act under the provisions of said section.

1881, 234, § 3; P. S. 146, § 18; 160 Mass. 232.

SECTION 18. [*Decrees of divorce to be entered nisi.*] Decrees of divorce shall in the first instance be decrees nisi, and shall become absolute after the expiration of six months from the entry thereof, unless the court before the expiration of said period, for sufficient cause, upon application of any party interested, otherwise orders.

1867, 222, § 1; 1870, 404, § 3; 1873, 371, § 2; 1874, 397, § 2; 1881, 234, § 2; P. S. 146, § 19; 1882, 223; 1893, 194, 280; 157 Mass. 503; 168 Mass. 228.

SECTION 19. [*Libel for desertion not to be defeated by temporary return.*] A libel for divorce for desertion shall not be defeated by a temporary return or other act of the libellee if the court finds that such return or other act was not made or done in good faith, but with the intent to defeat such libel.

1855, 137, § 8; G. S. 107, § 8; P. S. 146, § 20.

RESUMPTION OF FORMER NAME BY WIFE.

SECTION 20. [*Resumption of former name by wife.*] The court upon granting a divorce to a woman may allow her to resume her maiden name or the name of a former husband.

1849, 141; G. S. 107, § 23; P. S. 146, § 21.

RIGHT TO MARRY AGAIN.

SECTION 21. [*Remarriage of divorced parties.*] After a decree of divorce has become absolute, either party may marry again as if the other were dead, except that the party from whom the divorce was

granted shall not marry within two years after the decree has become absolute.

1841, 83; 1853, 349; 1855, 137, § 9; 426; G. S. 107, § 25; 1864, 216; 1873, 371, § 4; 1881, 234, § 4; P. S. 146, § 22; 113 Mass. 458; 122 Mass. 3; 126 Mass. 34; 152 Mass. 533.

EFFECT OF DIVORCE ON LEGITIMACY OF CHILDREN.

SECTION 22. [*Divorce for adultery by wife not to affect legitimacy of issue.*] A divorce for adultery committed by the wife shall not affect the legitimacy of the issue of the marriage, but such legitimacy, if questioned, shall be tried and determined according to the course of the common law.

1785, 69, § 6; R. S. 76, § 20; G. S. 107, § 27; P. S. 146, § 23.

EFFECT OF DIVORCE ON RIGHTS TO PROPERTY.

SECTION 23. [*Effect of divorce for adultery of wife upon her separate property.*] Upon a divorce for adultery committed by the wife, her title to her separate real and personal property during her life shall not be affected, except that the court may decree to the husband so much of such property as it considers necessary for the support of the minor children of the marriage who may have been decreed to the husband's custody; and if the wife afterward contracts a lawful marriage, the interest of the divorced husband in the wife's separate real and personal property, after her death, shall cease, except in so much thereof as may have been decreed to him as herein provided.

1877, 178, § 5; P. S. 146, § 27.

SECTION 24. [*No dower to wife after divorce, except, etc.*] After a divorce, a wife shall not be entitled to dower in the land of her husband, unless, after a decree of divorce nisi granted upon the libel of the wife, the husband dies before such decree is made absolute, except that, if the divorce was for the cause of adultery committed by the husband or because of his sentence to confinement at hard labor, she shall be entitled to her dower in the same manner as if he were dead.

1785, 69, § 5; R. S. 76, § 32; 102, § 9; G. S. 107, § 38; 135, § 29; 1870, 404, § 4; P. S. 146, § 28; 174, § 13; 13 Mass. 230; 14 Mass. 219; 2 Allen, 45; 110 Mass. 463.

CARE AND SUPPORT OF CHILDREN.

SECTION 25. [*Care and maintenance of minor children.*] Upon a decree of divorce, or upon petition at any time after such decree, the court may make such decree as it considers expedient relative to the care, custody and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain; and afterward may from time to time, upon the petition of either parent, revise and alter such decree or make a new decree, as the circumstances of the parents and the benefit of the children may require.

1820, 56, § 1; R. S. 76, § 26; 1853, 23, § 1; G. S. 107, §§ 33, 48; 1873, 371, § 7; P. S. 146, § 29; 152 Mass. 16; see St. 1902, ch. 324.

SECTION 26. [*When divorce obtained out of commonwealth.*] If, after a divorce has been decreed in another state or country, minor children of the marriage are inhabitants of this commonwealth, the superior court, upon the petition of either parent or of a next friend in behalf of the children, after notice to both parents, may make like decrees relative to their care, custody, education and maintenance as if the divorce had been decreed in this commonwealth.

1842, 83, § 1; G. S. 107, § 34; P. S. 146, § 30; 156 Mass. 27.

SECTION 27. [*Children not to be removed from commonwealth.*] A minor child of divorced parents who is a native of or has resided five years within this commonwealth and over whose custody and maintenance the superior court has jurisdiction shall not, if of suitable age to signify his consent, be removed out of this commonwealth without such consent, or, if under that age, without the consent of both parents, unless the court upon cause shown otherwise orders. The court, upon application of any person in behalf of such child, may require security and may issue writs and processes to effect the purposes of this and the two preceding sections.

1842, 83, § 2; G. S. 107, § 35; P. S. 146, § 31.

SECTION 28. [*Custody of children.*] In making an order or decree relative to the custody of children pending a controversy between their parents, or relative to their final possession, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happi-

ness and welfare of the children shall determine their custody or possession.

1855, 137, § 7; G. S. 107, § 37; P. S. 146, § 32; 151 Mass. 349.

GENERAL POWERS OF COURT.

SECTION 29. [*Proceedings under this chapter.*] The superior court may, if the course of proceeding is not specially prescribed, hear and determine all matters coming within the purview of this chapter according to the course of proceeding in ecclesiastical courts or in courts of equity, and may issue process of attachment and of execution and all other proper and necessary processes.

1785, 69, § 8; 1820, 56, § 1; R. S. 76, § 38; G. S. 107, § 53; P. S. 146, § 33; 1887, 332, § 1; 107 Mass. 428; 109 Mass. 306; 150 Mass. 57; 161 Mass. 111.

SECTION 30. [*Alimony.*] Upon a divorce, or upon petition at any time after a divorce, the superior court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband.

1785, 69, § 5; 1805, 57; 1810, 119; 1828, 55; R. S. 76, § 31; 1838, 126, § 2; 1844, 129; 1850, 100, § 3; 1853, 23, § 1; 1857, 228, § 3; G. S. 107, §§ 43, 44, 48; 1873, 371, § 7; P. S. 146, § 36; 1887, 332, § 1; 100 Mass. 365; 107 Mass. 428; 108 Mass. 314; 120 Mass. 390; 147 Mass. 159; 150 Mass. 92; 161 Mass. 111; 168 Mass. 511.

SECTION 31. [*Enforcement of decrees for.*] The court may enforce decrees made for allowance, for alimony or for allowance in the nature of alimony, in the same manner as it may enforce decrees in equity.

1858, 47; G. S. 107, § 45; P. S. 146, § 37; 105 Mass. 385; 106 Mass. 499; 130 Mass. 163, 189; 134 Mass. 353; 166 Mass. 226.

SECTION 32. [*Security for.*] When alimony or an annual allowance is decreed for the wife or children, the court may require sufficient security to be given for its payment according to the terms of the decree.

1820, 56, § 2; R. S. 76, § 35; G. S. 107, § 46; P. S. 146, § 38.

SECTION 33. [*Revision of decree for, etc.*] After a decree for alimony or an annual allowance for the wife or children, and also after a decree for the appointment of trustees to receive and hold property in trust for the use of the wife or children as before provided, the

court may, from time to time, upon the petition of either party, revise and alter its decree relative to the amount of such alimony or annual allowance and the payment thereof and also relative to the appropriation and payment of the principal and income of the property so held in trust, and may make any decree relative to said matters which it might have made in the original suit.

1785, 69, § 5; 1824, 138; R. S. 76, § 36; 1853, 23, § 1; G. S. 107, §§ 47, 48; P. S. 146, § 39; 134 Mass. 353; 161 Mass. 111; 168 Mass. 511.

SECTION 34. [*Costs on petitions for, etc.*] In all proceedings under the provisions of this chapter, the court may award costs in its discretion.

1820, 56, § 2; R. S. 76, § 37; 1853, 23, § 2; G. S. 107, § 49; P. S. 146, § 40; 1 Met. 279; 161 Mass. 111; see R. L., ch. 203, § 14.

FOREIGN DIVORCES.

SECTION 35. [*Validity of foreign divorces.*] A divorce decreed in another state or country according to the laws thereof by a court having jurisdiction of the cause and of both the parties, shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another state or country to obtain a divorce for a cause which occurred here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth.

R. S. 76, §§ 39, 40; G. S. 107, §§ 54, 55; P. S. 146, § 41; 2 Gray, 367; 97 Mass. 538; 115 Mass. 438, 449; 122 Mass. 3, 156; 129 Mass. 14; 136 Mass. 328; 154 Mass. 290; 157 Mass. 42; 167 Mass. 474; 176 Mass. 92.

CRIMINAL PROVISIONS.

SECTION 36. [*Cohabitation after divorce to be adultery.*] If persons who have been divorced from each other cohabit as husband and wife or live together in the same house, they shall be held to be guilty of adultery.

1785, 69, § 6; R. S. 76, § 19; G. S. 107, § 24; P. S. 146, § 42.

SECTION 37. [*Penalty for personation, etc., in divorce suits.*] Whoever falsely personates another or wilfully and fraudulently procures a person to personate another, or fraudulently procures false

testimony to be given, or makes a false or fraudulent return of service of process upon a libel for divorce or in any proceeding connected therewith, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than two years.

1873, 371, § 1; P. S. 146, § 43.

SECTION 38. [*Penalty for procuring unlawful divorce.*] Whoever knowingly procures or obtains or assists another to procure or obtain any false, counterfeit or fraudulent divorce or decree of divorce, or any divorce or decree of divorce from a court of another state for or in favor of a person who at the time of making application therefor was a resident of this commonwealth, such court not having jurisdiction to grant such decree, shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than six months.

1886, 342.

SECTION 39. [*For advertising to procure divorces.*] Whoever, not being duly admitted as an attorney-at-law in this commonwealth, writes, prints or publishes, or solicits another to write, print or publish, any notice, circular or advertisement soliciting employment in the business of procuring divorces or offering inducements for the purpose of procuring such employment shall be punished as provided in the preceding section.

1887, 320.

SECTION 40. [*For unlawfully issuing certificates of divorce.*] Whoever, except in compliance with an order of a court of competent jurisdiction, gives, signs or issues any writing which purports to grant a divorce to persons who are husband and wife according to the laws of this commonwealth or which purports to be a certificate that a divorce has been granted to such persons shall be punished by a fine of not more than one thousand dollars or by imprisonment in the jail for not more than three years, or by both such fine and imprisonment.

1891, 59.

SECTION 41. [*Notice to district attorney of criminal offences.*] If a divorce is granted for a cause which constitutes a crime, committed within this commonwealth and within the time provided by law for making complaints and finding indictments therefor, the court

which grants the divorce may in its discretion cause notice of such facts to be given by the clerk of the court to the district attorney for the county in which such crime was committed, with a list of the witnesses proving such crime and any other information which the court may consider proper, and thereupon the district attorney shall cause complaint therefor to be made before a magistrate having jurisdiction thereof, or shall present the evidence thereof to the grand jury.

1881, 234, § 1; P. S. 146, § 44.

STATISTICS OF DIVORCE.

SECTION 42. [*Returns of statistics of divorce.*] The clerks of the courts and the clerk of the superior court for civil business in the county of Suffolk shall annually, in February, make returns for the last preceding calendar year to the secretary of the commonwealth, upon suitable blank forms which shall be provided by him, of the number of libels pending at the beginning of the year, the number of libels filed within the year, the number of divorces granted, the number of divorces refused, the number of libels contested, the number of libels uncontested, the alleged cause for divorce in each case, the sex of the libellant and the length of time the parties have been married, and the number of cases in which notice has been given to the district attorney for prosecution under the provisions of the preceding section and the crime for which divorce has been granted in such cases.

1882, 194, §§ 1, 2.

SECTION 43. [*Publication of abstracts of returns.*] The secretary shall annually prepare from said returns abstracts and tabular statements of the facts relative to divorces for each county, and embody them, with necessary analyses, in his annual report to the general court relative to the registry of births, marriages and deaths.

1882, 194, § 3.

[ST. 1902, CHAP. 324.]

AN ACT RELATIVE TO THE WRIT OF HABEAS CORPUS.

Be it enacted, etc., as follows:

SECTION 1. Any court which has jurisdiction of libels for divorce or for nullity of marriage, of petitions for separate support or maintenance, or of any other proceeding in which the care and custody of any child or children is drawn in question, may issue a writ of habeas corpus when necessary in order to bring before it such child or children. The writ may be made returnable forthwith before the court by which it is issued, and, upon its return, said court may make any appropriate order or decree relative to the child or children who may thus be brought before it.

SECTION 2. This act shall take effect upon its passage. [*Approved April 18, 1902.*]

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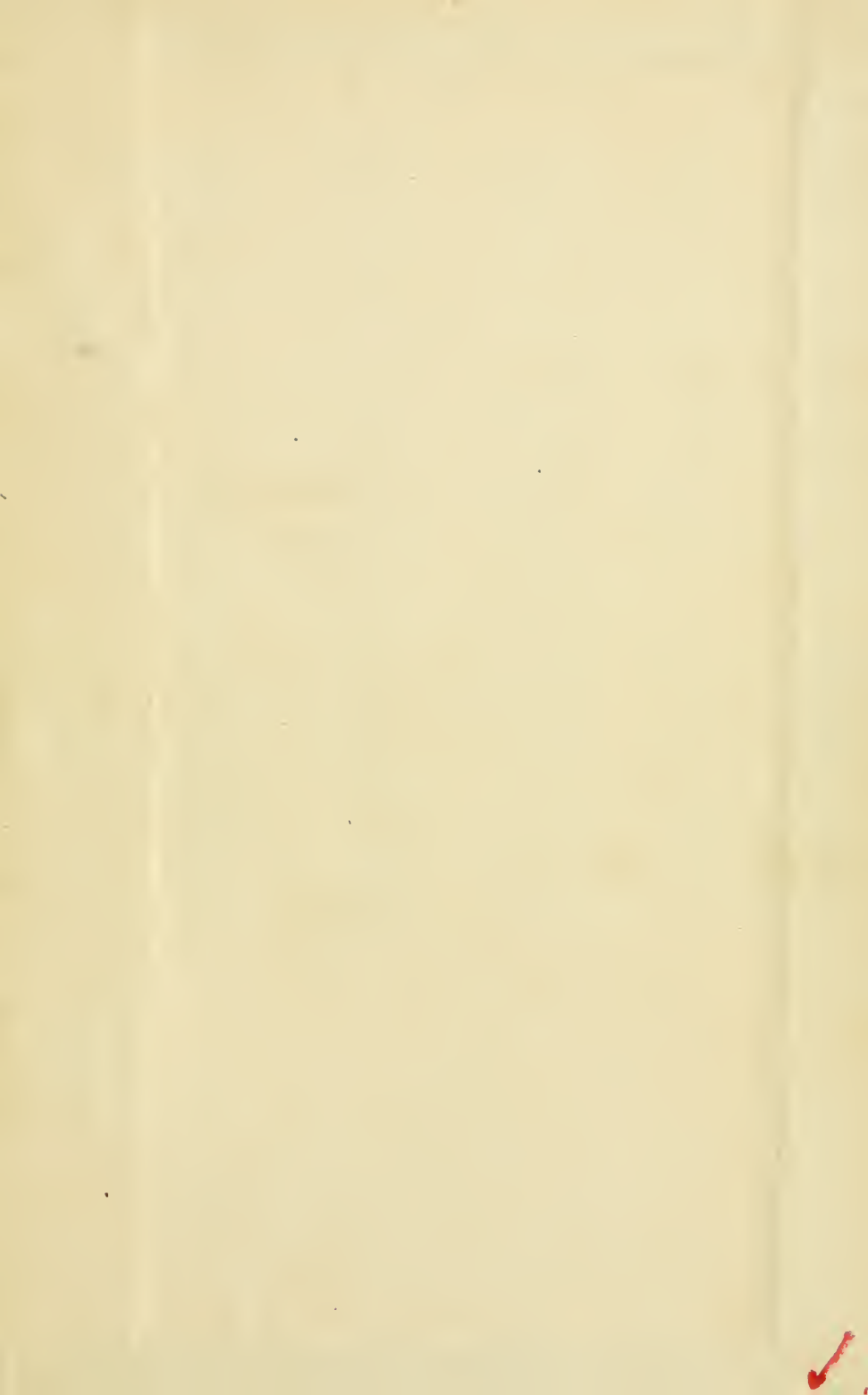
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